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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 200 1917

No. [REDACTED] 255

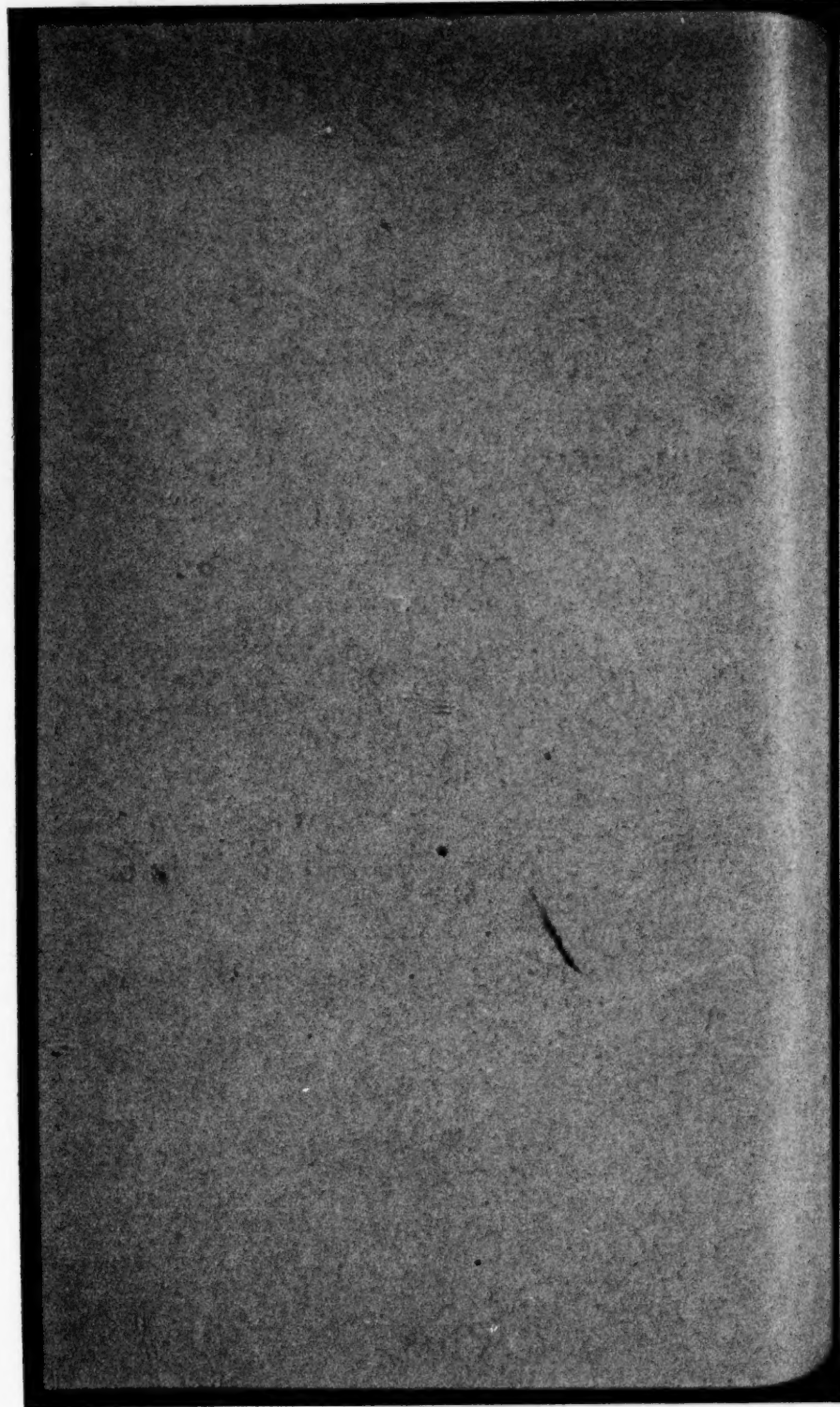
BYRON S. WAITE, ISRAEL F. FISCHER, AND HENDERSON M. SOMERVILLE, AS GENERAL APPRAISERS, DESIGNATED BY THE SECRETARY OF THE TREASURY AS THE BOARD OF TEA APPEALS, APPELLANTS,

GEORGE H. MACY, OLIVER C. MACY, GEORGE S. CLAPP, T. RIDGWAY MACY, AND IRVING K. HALL, DOING BUSINESS AS COPARTNERS UNDER THE NAME OF CARTER, MACY & COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED AUGUST 26, 1916.

(25465)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 635.

BYRON S. WAITE, ISRAEL F. FISCHER, AND HENDERSON M. SOMERVILLE, AS GENERAL APPRAISERS, DESIGNATED BY THE SECRETARY OF THE TREASURY AS THE BOARD OF TEA APPEALS, APPELLANTS,

VS.

GEORGE H. MACY, OLIVER C. MACY, GEORGE S. CLAPP, T. RIDGWAY MACY, AND IRVING K. HALL, DOING BUSINESS AS COPARTNERS UNDER THE NAME OF CARTER, MACY & COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

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Bill of Complaint.

1

United States District Court

**FOR THE SOUTHERN DISTRICT OF NEW
YORK**

GEORGE H. MACY, OLIVER C.
MACY, GEORGE S. CLAPP, T.
RIDGWAY MACY and IRVING
K. HALL, doing business as
co-partners under the name
of Carter, Macy & Company,
Complainants,

2

AGAINST

In Equity
11-85

GEORGE STEWART BROWN, E. G.
HAY and S. B. COOPER as
General Appraisers of the
United States designated by
the Secretary of the Treasury
of the United States as the
Tea Board,

3

Defendants

TO THE HONORABLE JUDGES OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK :


GEORGE H. MACY, OLIVER C. MACY, GEORGE S.
CLAPP, T. RIDGWAY MACY and IRVING K. HALL, co-
partners doing business in The City of New York,
bring this their Bill of Complaint against GEORGE

Bill of Complaint.

- 4 STEWART BROWN, E. G. HAY and S. B. COOPER as
General Appraisers as aforesaid, and thereupon:—

I. Your orators complain and say that the defendants are and at all the times hereinafter mentioned were General Appraisers of the United States designated by the Secretary of the Treasury of the United States under the Act of Congress of March 2, 1897, entitled "An act to prevent the importation of impure and unwholesome teas" hereinafter referred to as the Tea Law, to act as the Board of Three General Appraisers provided by section 6 of the said Act for the purpose of conducting re-examinations of teas theretofore rejected by examiners at ports of entry.

II. Your orators are co-partners engaged in business under the firm name of Carter, Macy & Company at No. 142 Pearl Street in the Borough of Manhattan in The City of New York, and each and every of them is a citizen of the United States and said co-partnership is chiefly engaged in the importation of teas, among which it imports large quantities of green or unfermented teas.

III. Heretofore your orators caused to be shipped from Shanghai, China, for the purpose of importing the same into the United States through the port of San Francisco, forty-four cases of Extra First Young Hyson teas bearing the distinguishing mark  and the numbers 5, 6 and 7. The said teas arrived in San Francisco on January 5, 1914. On information and belief said teas were of the highest quality known to the market and were and are pure and uncolored teas of the highest grade, vastly superior in purity, quality and fitness for consumption to the standard samples established by the Secretary of the Treasury under Section 3 of the said Tea Law as the standards in

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comparison with which teas of their class were and 7
are to be examined to determine whether or not
their importation is to be permitted, and the value
and the purchase price paid by your orators for
the said teas was more than four times the aver-
age value in the same markets of the teas consti-
tuting the said standard.

IV. On information and belief, that upon the ar-
rival of said teas at the port of San Francisco the
said teas were examined by the examiner at that
port by means of the method of examination here-
inafter in paragraph VI of this Bill referred to, 8
and on or about January 13th and 14th, 1914,
were by him rejected for color; that is to say, on
the ground that they were inferior in purity to
the said standards established as aforesaid, by rea-
son of the alleged inclusion therein of certain col-
oring matter. Your orators, having been notified
of the said rejection, duly protested against the
same in the manner provided by section 6 of the
said Tea Law and in accordance with the said stat-
ute the matter in dispute was thereupon referred
to the defendants as the Board of Three United
States General Appraisers provided by the said 9
statute to re-examine rejected teas under such cir-
cumstances. By reason of the premises the said
teas will within a short time come before the de-
fendants for re-examination and upon such re-
examination by the defendants will be admitted
to importation or rejected.

V. When the said teas come before the said de-
fendants for the said re-examination it will be the
duty of the defendants under the said Act to con-
duct the said re-examination in order to ascertain
whether the said teas are entitled to be admitted,
by comparing the same with the standards estab-
lished as aforesaid by the Secretary of the Treasury

Bill of Complaint.

- 10 for teas of their class, and by testing the purity, quality and fitness for consumption of the same in comparison with the said standards in the manner required by the said Act; that is to say, by testing the same according to the usages and customs of the tea trade including the testing of an infusion of the same in boiling water and, if necessary, by chemical analysis.

- 11 VI. On information and belief, that the defendants, regardless of their duty to examine the said teas when they shall arrive in the manner aforesaid, threaten and intend to examine the same otherwise and in a manner unauthorized by law, to wit, by using a purely mechanical method of examination not authorized by law and known as the Read Test, which is neither a method in accordance with any usage or custom of the tea trade, nor a form of chemical analysis. The said defendants threaten to carry out said examination in accordance with the method prescribed in a certain purported regulation known as T. D. 33211, dated February 24, 1913, alleged to have been issued by the Secretary of the Treasury. A copy of the said alleged regulation is hereto annexed and made a part hereof and marked Exhibit "A".
- 12

VII. On information and belief, that in conducting the said re-examination of said teas for purity and fitness for consumption in accordance with the said method, the said defendants threaten and intend to make the result of their examination depend upon the result of said Read Test, without regard to the result of such examination of the said teas as may be made, if any, in the only manner prescribed by law, namely, in accordance with the usages and customs of the tea trade or by chemical analysis. If examined in the method which the defendants threaten to adopt and which the said regulation Exhibit "A" purports to require and

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would, if valid, require, all teas which are classified 13
by the said Read Test as below the standard are
necessarily rejected irrespective of the result of any
chemical analysis which may be employed and ir-
respective of the results of any test in accordance
with the usages and customs of the tea trade.

VIII. On information and belief your orators
further show that upon the said re-examination,
defendants threaten and intend to reject said teas
if, by means of the said test or otherwise, the said
teas are found to contain matter adopted for use as
coloring or facing of any kind or in any quantity,
irrespective of whether the same is or is not used 14
or applied so as to conceal damage or inferiority or
to improve the appearance or apparent value of the
said tea, and irrespective of whether the same is
intentionally or accidentally included, and irre-
spective of whether or not the same is harmless or
injurious to health in character or quantity, and
irrespective of whether or not the said teas shall be
found to contain, all told, including such matter
adapted to use as coloring or facing, a greater or
less total content of impurity or foreign substance
than the standard prescribed by the Secretary of
the Treasury, in comparison with which the said 15
teas are required by law to be examined.

IX. The defendants further threaten to carry
out the said examination in the said manner
whether or not in the case of the said teas any
chemical analysis is necessary, and threaten and
intend, in their said examination, to apply the said
chemical analysis, in so far as the same is used at
all, not, as required or authorized by law, to the
teas themselves, but to certain markings upon paper
to be procured by them in the course of the appli-
cation of the said Read Test as prescribed in the
said alleged regulation, Exhibit "A".

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- 16 X. On information and belief, that the said
Read Test is not only unauthorized by any express
provision of law, but is contrary to the spirit, in-
tent and meaning of the statutes governing the im-
portation of teas in that its results are uncertain,
arbitrary, unfair and impossible to foresee. Its ap-
plication frequently causes the rejection of teas
superior in quality, purity and fitness for consump-
tion to the standards established by the Secretary
of the Treasury, and causes the admission of teas
inferior to the said standards. It detects in-
finitesimal quantities of harmless coloring or facing
17 matter accidentally included in the course of pre-
paring or packing pure uncolored teas, and at times
fails to detect similar foreign substances even when
not merely accidentally included but intentionally
applied—if applied with sufficient skill—to the
leaves of actually colored teas. It does not and
cannot detect the presence of impurities or foreign
matter other than certain substances used for
coloring or facing teas, no matter how large in
quantity or harmful or even filthy in character.
The results of an examination by its use cannot be
anticipated by even the most careful importer, for
the reason that in the existing state of the trade
18 large classes of teas are necessarily manufactured
under conditions in which such infinitesimal par-
ticles of coloring matter may accidentally be in-
cluded in and among the relatively large quantities
of foreign matter in the form of dust which are
always present in all teas, so that when the tea is
examined on its purchase by the importer by means
of the said Read Test he may test many samples
without finding any containing such accidental in-
clusions, while the examiner at the port of entry
may accidentally hit upon samples containing the
said particles. The use of chemical analysis which
the said defendants threaten to make and which the
said alleged regulation, Exhibit "A", would require

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them to make in connection with the said Read 19
Test is unauthorized and illegal not only as here-
inbefore alleged, because it is not permitted to alter
or affect the results of the application of the said
Read Test and otherwise, but also because the sub-
stance to be analyzed thereby is so minute, repre-
senting less than one-millionth part by bulk of the
two ounce sample examined, that no method of
chemical analysis will fairly enable the examiner to
state its fair relation to the sample of tea examined
or to determine how much of the said matter the
sample contains or whether the total impurities in
the sample are less or more than in the standard. 20
The quantity of substances so chemically analyzed
is so small that any error therein or any accidental
inclusion, in the substance to be analyzed, of foreign
substances not derived from the tea under examina-
tion, necessarily causes a similar error multiplied
many thousand times in the result of the said an-
alysis, so that no fair or reasonable determination,
such as was contemplated by the said Act, of the
purity, quality and fitness for consumption of the
tea examined, in comparison with the said stand-
ards can be made to depend in any respect upon
the said analysis.

XI. On information and belief, that by reason of 21
the defective, unfair and uncertain character of the
said illegal method of examination as aforesaid,
the use of the same in the re-examination of the
said teas by the defendants is likely to result, as it
has already resulted in the case of the examina-
tion of the same at San Francisco, in the illegal
and unauthorized rejection of the same, notwith-
standing the aforesaid great superiority of the same
to the said standards in purity, quality and fitness
for consumption, and notwithstanding that the
purity, quality and fitness for consumption of the
said teas are such that upon lawful examination in

Bill of Complaint.

- 22 the manner contemplated and provided by the said
Tea Law, they would necessarily be admitted.

XII. The said teas of your orators hereinbefore mentioned are but a small part of the large quantities of similar teas which your orators are annually accustomed to import and intend hereafter to import, many of which they have already purchased and ordered shipped. Parts of other consignments, already arrived, have been rejected and upon your orators' protest are awaiting re-examination by the defendants. The said defendants' unless restrained by a court of competent jurisdiction, threaten to apply and will apply the said illegal method of examination to all such subsequent re-examinations of your orators' teas.

XIII. By reason of the uncertainty which has been and will be produced by the use of the said method of examination, your orators will necessarily suffer irreparable injury through the illegal rejection of teas lawfully entitled to be admitted, and superior to the standards in purity, quality and fitness for consumption, and which were purchased by them after taking every precaution known to the tea trade to secure the highest degree of purity, quality and fitness for consumption, and requirements of law for admission, and your orators will so suffer so long as the said method of examination is in use.

XIV. The said illegal rejection of said teas sought to be imported by your orators has caused in the past, and will necessarily in the future, cause your orators damages difficult, if not impossible, of computation, not only in the losses occasioned by the inability to carry out their contracts for the sale of the said illegally rejected teas, but also by the loss of customers who, being unable to

Bill of Complaint.

secure delivery of teas which they have ordered 25
from your orators, have cancelled in the past, and
will necessarily in the future, cancel their con-
tracts with your orators and purchase such teas as
they require from the competitors of your orators.

XV. The said illegal rejections resulting from
the use of the said illegal method of examination
have also, in the past, and will necessarily in the
future, injure the business credit and good name of
your orators to an extent and in a manner which
cannot be compensated by the recovery of damages
at law.

26

XVI. If the defendants be permitted to examine
the said teas by the said illegal method, the damage
which may result to the complainants in the several
manners hereinbefore alleged will exceed the sum
of three thousand dollars.

XVII. On information and belief, that the said
teas which your orators have purchased for import
will come before the defendants for re-examination
long before a hearing can be had and final judg-
ment rendered in this action. Unless, therefore,
this Honorable Court will lend its aid by the grant
of a preliminary injunction restraining the use of 27
the said illegal method of examination in the re-
examination of said teas until the final determina-
tion of this action, the relief sought will be ren-
dered nugatory and your orators left remediless.

XVIII. Your orators further complain and say
that as they have no adequate relief except in this
Court and to the end that the defendants may, if
they can, show cause why your orators should not
have the relief hereby prayed, that the said defend-
ants make a full disclosure and discovery of all the
matters aforesaid according to the best and utmost

Bill of Complaint.

28 of their knowledge, remembrance, information and
belief, a full, true and perfect answer make to the
matters hereinbefore stated and charged, but not
under oath, an answer under oath being hereby
waived.

XIX. Your orators further pray that a provisional or preliminary injunction, and thereafter a permanent injunction, be issued restraining the said defendants, their agents, employees and servants, and deputies under them and any person who may be deputed in their place and stead, from
29 examining or assuming to examine the said teas by means of the said illegal method and from using the said Read Test in their said examination and from making the result of their examination depend upon the result of the said Read Test and from making use, in the course of their examination, of chemical analysis of said sheets prepared according to the said test, or any chemical analysis other than chemical analysis of the said teas themselves, and in general, from examining the said teas in any other manner than as required by statute in accordance with the usages and customs of the tea trade, including the testing of the in-
30 fusion of the same in boiling water and, if necessary, chemical analysis, and also from making the result of their examination, in whatever manner made, depend upon the mere presence or absence of material adapted for use as coloring or facing matter irrespective of whether the total impurity, if any, present in the said teas, including said coloring or facing matter, is greater or less than in the said standard and irrespective of whether the said matter is harmful or deceptive in quantity, character or method of application, and your orators also pray that they may have such other or further relief as in the premises may be just.

May it please your Honors to grant unto your

Bill of Complaint.

orators not only a writ of injunction conformable 31
to the prayer of this Bill, but also a writ of sub-
pœna of the United States of America directed to
the said defendants commanding them on a day
certain to appear and answer to this Bill of Com-
plaint and abide by and perform such order and
decree in the premises as to the Court shall seem
proper in accordance with the principles of equity
and good conscience.

EVARTS, CHOATE & SHERMAN,
Solicitors for Complainants,
60 Wall Street,
Borough of Manhattan, 32
City of New York.

JOSEPH H. CHOATE, JR.,
Of Counsel.

STATE OF NEW YORK	}	ss:
County of New York		
Southern District of New York		

IRVING K. HALL,
being duly sworn, deposes and says that he is one
of the complainants above named; that he has read
the foregoing Bill of Complaint and the statements
contained therein are true of his own knowledge
except so far as they are alleged to be stated on in-
formation and belief, as to which statements de- 33
ponent believes the same to be true.

The sources of deponent's information and the
grounds of his belief as to the several matters al-
leged on information and belief are statements
made to the deponent and to the complainants by
reliable employees of the complainants having per-
sonal knowledge of the facts and also statements
made to the complainants by a competent chemist
employed by them to obtain information as to the
facts alleged. As to the alleged intentions of the
defendants the complainants' information is based
in part upon the conduct of the defendants in the
past in conducting examinations of the class re-

Bill of Complaint.

- 34 referred to and in following the alleged regulation (Exhibit "A") of the Treasury Department hereinbefore referred to.

IRVING K. HALL

Subscribed and sworn to before me }
 this 10th day of February, 1914. }

WILLIS H. MORRIS,

Notary Public, Kings Co.

Certificate filed in New York Co.

(Notarial seal)

Schedule "A."

35

(attached to Bill of Complaint)

READ METHOD, WITH ADDITIONS AND MODIFICATIONS, FOR EXAMINATION OF TEA.

- Place 2 ounces of tea in a sieve 5 inches in diameter, having 40 meshes to the inch, and sift a small quantity of the dust onto a semi-glazed white paper about 8 x 10 inches. The amount of dust placed on the paper should be approximately the weight of one-eighth of a silver half dime, or about two grains. To get the requisite amount of dust it is sometimes necessary to rub the leaf against the
- 36 bottom of the sieve. The dust should be well distributed or peppered over the surface of the paper. The paper is placed on a plain, firm surface, preferably glass or marble, and the dust crushed by drawing over it, with considerable pressure, a flat steel spatula about 5 inches long. This is done repeatedly, the tea dust being ground almost to a powder and the particles of coloring matter, if any, being thus spread or streaked on the paper, so as to become more apparent. The loose dust may then be blown off, and the paper examined by means of a simple lens magnifying $7\frac{1}{2}$ diameters. In distinguishing these particles and streaks bright light is essential.

Bill of Complaint.

The crushed leaf in either black or green tea appears in such quantity that there is no chance of mistaking the leaf for coloring or facing material. 37

This test is performed in comparison with the standard, and if the tea is clearly equal to the standard as regards coloring or facing matter, the operation need not be repeated. If particles of coloring or facing are found in the sample under comparison with the standard, this operation should be repeated a sufficient number of times for the examiner to satisfy himself as to whether or not the tea is in fact equal thereto. If found not equal to the standard, samples should be drawn from packages representing at least 5 per cent of the line in question and subjected to the above test, and if a majority of these samples are below the standard, a test sheet of the tea in question should then be sent to the local appraiser's chemist or to the nearest pure-food laboratory of the Department of Agriculture for identification of the coloring or facing matter disclosed. As soon as the coloring or facing matter is identified, then the tea should be rejected. 38

The above test is to be applied to all varieties of tea.

In the case of Japans and all other green (un-fermented) teas, in addition to the above white-paper test, repeat the operation in comparison with the respective standard on semi-glazed black paper or facings, and if it is not equal to the standard, additional samples should be drawn and tested as provided above in the test on white paper, and if found below the standard the tea should be rejected after the facing disclosed has been duly identified by the chemist. This black paper test detects all facings like talc, gypsum, barium, sulphate, clay, etc. 39

40

Answer.**DISTRICT COURT OF THE UNITED STATES****FOR THE SOUTHERN DISTRICT OF NEW YORK**

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GEORGE H. MACY, OLIVER C.
MACY, GEORGE S. CLAPP, T.
RIDGEWAY MACY, and IRVING
K. HALL, doing business as
co-partners under the name
of CARTER, MACY & COM-
PANY,

Complainants,

v.

GEORGE STEWART BROWN, E. C.
HAY, and S. B. COOPER, as
General Appraisers of the
United States designated by
the Secretary of the Treasury
of the United States as the
Tea Board,

Respondents.

In Equity
11—85

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Answering the bill of complaint herein the respondents, by William L. Wemple, Assistant Attorney General, their solicitor, show:

1. They admit the allegations contained in paragraphs 1 and 2 of the bill.

2. They admit the allegations contained in the first sentence of paragraph 3. As to the allegations contained in the remainder of said paragraph, the respondents have no knowledge.

Answer.

3. Respondents admit the allegations contained in paragraph 4 of the complaint, except as to the matters stated in the last sentence of that paragraph, as to which they say that after the complainants did, by their own action, invoke the authority of the Board of Tea Appeals, they filed their bill praying that the said Board be enjoined from exercising that authority. 43

4. As to paragraph 5, the respondents say that when teas are brought before them for final re-examination, it is their duty to, and they do in fact in every case, re-examine the same in accordance with the law as found in the act of March 2, 1897, and the regulations made pursuant to authority therein granted and not otherwise. Each allegation in paragraph 5 not covered by this admission is denied. 44

5. As to paragraph 6 of the bill, the respondents deny each allegation therein contained; but state that they have heretofore and will hereafter finally re-examine all teas duly brought before them in accordance with the law as hereinabove defined, and not otherwise.

6. As to paragraphs 7 and 8 of the bill, the respondents deny each and every allegation therein, except so far as such allegations are identical with the statement made in the paragraph next above. 45

7. The respondents deny the allegations contained in paragraph 9 of the bill in manner and form as alleged.

8. The respondents deny each allegation in paragraph 10 of the bill, except that they admit that it is not attempted by the application of regulation

Answer.

46 22 of T. D. 33211 to detect or isolate impurities and filth in tea other than impurities and filth such as are used for coloring and facing such tea.

9. The respondents deny the allegations contained in paragraph 11 of the complaint.

10. Concerning the allegations of paragraph 12 of the complaint, the respondents have no knowledge.

47 11. The respondents deny the allegations of paragraph 13 of the bill.

12. Concerning the allegations of paragraphs 14 and 15 of the bill, the respondents have no knowledge, except as to the inferential allegation that the respondents have illegally rejected any of the complainants' teas, which statement they deny.

48 13. As to the allegations in paragraph 16 of the complaint, the respondents have no knowledge, except concerning the inferential statement that they expect to or will use any illegal methods in the examination of complainants' teas; that statement is denied.

14. Concerning the allegations in paragraph 17 of the complaint, the respondents have no knowledge.

15. Concerning the allegations in paragraph 18 of the complaint, the respondents deny that the complainants have no adequate relief except in equity, and allege that the bill sets up no facts authorizing the intervention of this court as a court of equity.

Answer.

16. Each and every allegation of the bill not 49
hereinbefore specifically admitted to be true, the
respondents deny.

Further answering the bill of complaint, the re-
spondents state that for many years tea has been
regularly imported from Oriental countries into
the United States in large quantities under per-
mission of the Government of the United States;
that from and after the year 1883, such importa-
tions were permitted only under the provisions of
the act of March 2, 1883 (22 Stat. 451) entitled
"An Act to prevent the importation of adulterated 50
and spurious teas," and regulations made pursuant
to the terms of said Act. That with the growth of
public sentiment in favor of pure standards of food
products, and against all devices for improving by
adulterations, admixtures and other artificial
methods, the appearance and apparent quality of
food products, the provisions of said Act were
found ineffectual to exclude any teas except those
with the most considerable admixtures of chemical
and other filth; but on the contrary permitted a
state of affairs to arise so that just before the adop-
tion by Congress of the Act of 1897, the lowest
average grade of tea ever before known was being 51
used by the consumers of the United States. To
afford a remedy for that condition, Congress
adopted the Act of March 2, 1897, as a more strin-
gent substitute for the Act of 1883, and providing
for the establishment from time to time of
standards, up to which imported merchandise
must measure, even under chemical analysis, or
else be excluded.

For some years following, tea admixed with
chemicals, dirt and impurities such as prussian
blue, turmeric, indigo, barium sulphate, gypsum

Answer.

- 52 and ultramarine, continued to be imported; the object of course being to so dress and prepare inferior merchandise as to improve its appearance, apparent quality and selling value.

In February, 1911, the Tea Board, composed of seven tea experts and leading tea merchants from various parts of the United States, including one of these complainants, unanimously reported to the Secretary of the Treasury that any amount of extraneous chemical dirt or impurity ought to cause the exclusion of tea, and recommended the entire elimination of color; and about the same time the
53 Department of Agriculture determined that in order to pass in interstate commerce all artificially colored teas must under the pure food law be branded to show that fact.

These actions resulted in the adoption of a chemical analysis described in T. D. 31920. In February, 1912, the discovery of a more accurate chemical analysis was announced, and in May, Regulation 22 (T. D. 32322) was promulgated, superseding the form of chemical analysis theretofore used. This method of analyzing tea in order to isolate and detect the admixture of chemical filth and impurities was in its essential features known and
54 practiced in Japan long before its discovery in the United States; and upon its official adoption here, its use and practice at once became general throughout the tea producing localities of both Japan and China; resulting in the entire elimination of the use by the Japanese of the above and similar kinds of chemical filth and dirt in preparation of tea; and in the very extensive discontinuance thereof by the Chinese.

Thus the only teas arriving in the United States during the past few years, which have contained admixtures of chemical dirt and impurity, are

Answer.

those Chinese teas known as Country Greens and Ping Sueys; and those teas have not contained said impurities with any great frequency, less than 4% of the importations thereof in the year ending June 30, 1913, having been rejected on account of such impurities; and of the total importations of tea into the United States for that period only about $\frac{1}{2}$ of 1% were so rejected. Of the importations by these complainants of Country Greens and Ping Sueys for the year ending June 30, 1913, 2.2% were so rejected, and for the last six months of the calendar year 1913, only 78 one hundredths of one per cent of Ping Sueys were so rejected by the examiners. And in the year ending June 30, 1913, Country Greens, the only variety of tea now affected with any frequency by admixture of these chemical adulterants, constituted only about 3% of the total importations of tea into the United States; for the year ending June 30, 1913, 8.8% of the importation of these teas were rejected because of the presence of excessive quantities of chemicals; and for the 6 months ending December 31, 1913, 13% was so rejected.

The chemical filth and impurities in tea for the detection of which chemical analyses have been employed, and are alone adapted, are used for the sole purpose by the tea producers of improving the appearance and apparent quality of tea, to the end that the poorer may appear to be equal to the better. The early pickings of leaves usually neither require nor admit of such adulterations, but the pickings made later in the season contain the more woody leaves which are of inferior quality and texture, and but for treatment with chemical dirt and impurity, disclose their inferiority at once. And it appears from actual importations that teas arriving in the United States in the late autumn

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58 and winter are found to be adulterated with chemical filth much more frequently than those arriving in the summer.

That Board is and was by law composed of judicial officers of the United States, and such proceedings were had before it as resulted in a decision and finding that Regulation 22 in its present form is a chemical analysis, properly and lawfully prescribed by the Secretary of the Treasury for carrying into effect the provisions of the Act of March 2, 1897; and finally rejecting certain tea of these complainants under the application of that analysis, which decision is known as Treasury Decision 33087; which decision is by statute made absolutely final and unreviewable in any tribunal.

And until Congress shall see fit to act in the premises, the action of the Tea Board and of the Secretary of the Treasury in selecting and establishing standards of purity, quality and fitness for consumption for imported tea is not subject to regulation or review by this Honorable Court. Likewise, the respondents impleaded as constituting the Board of Tea Appeals, act in cases like that stated in the bill, as an appellate tribunal to review and correct the actions of examiners of Tea, under express provisions of statute; which functions these respondents exercise in accordance with the said statute, and instructions of the Secretary of the Treasury, made pursuant thereto; and in exercising their lawful functions, these respondents presume in the importers' favor all facts found in his favor by the tea examiner, re-examining such tea with reference only to those particulars and for those causes on account of which the examiner has found against the admissibility of the tea; and in cases where the examiner has so found on account of the presence of excessive chemicals, impurities,

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the respondents re-examine the same by means of chemical analysis, as prescribed by law, and these duties and functions this Honorable Court has no jurisdiction to regulate, direct, or prohibit. 61

Further answering, respondents aver that the standards adopted by the Secretary of the Treasury, and with which imported teas are compared, consist of actual importations of tea by merchants in the United States, in the ordinary course of trade, not imported or prepared with any thought of using the same as a standard; to the end that the standards shall not be artificial, arbitrary or theoretical, but rather merchantable tea, the occurrence of which in the ordinary channels of trade shows the practicability of avoiding less pure tea; and that within such limits certainly, the discretion of the Secretary of the Treasury is absolute. Respondents say further, that no method of analysis or examination used by them with respect to imported tea, has to do with infinitesimal matters; but only with foreign matter, chemicals and impurities which are present in appreciable and material amounts; and Regulation 22 does enable such impurities in tea to be detected when they are so admixed with tea; and when so occurring the law authorizes and requires such tea to be excluded, and respondents do exclude it under the authority of law. They cannot say, nor can this Honorable Court say that 1 part of prussian blue to 200,000 of tea is so small that the law of 1897 did not intend that notice should be taken of it, while some other quantity is large enough to come within the meaning of that law. 62 63

And said respondents further allege that the determination of the purity of imported tea as compared with the official standards is a matter vested by law in said respondents as members of the Board

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64 of Tea Appeals and that their determination of said comparative purity is a determination of fact which cannot be inquired into by any judicial tribunal at least in the absence of a direct allegation of bad faith, which is not alleged in said Bill of Complaint; and an allegation of bad faith, even if made in the Bill would give this court no jurisdiction of this proceeding.

65 Further answering, respondents aver it was found by universal experience that the cup test which was used until 1911 for the detection of chemicals, dirt and filth in imported tea was wholly inadequate and inefficient; tea might be substantially admixed with chemical as well as other filth, without its being discoverable by means of the cup test alone. Therefore, under the express authority of statute, chemical analysis was resorted to, and officially adopted as a test in 1911. The form of chemical analysis then adopted as the most workable in practice, was soon found to be uncertain in its results, and inefficient, on account largely of the presence in solution of portions of the substance of the tea, concealing foreign matter, and interfering with the use of reagents to identify and isolate chemical impurities. These 66 difficulties led shortly to the conclusion that to be accurate and reliable, the chemical analysis ought to proceed by separating the tea substance from the chemicals and other filth while the mixture was in a dry state. This, regulation 22 does .

Further answering, respondents aver that the results obtained in examining tea under Regulation 22 are not arbitrary, uncertain, unreliable, and unforeseeable; but on the contrary, the method of Regulation 22 is used throughout the countries exporting tea to the United States; and by the results of such use teas for shipment to the United States

Answer.

are refused or are purchased according to whether 67
in a given case there is or is not disclosed chemical
filth; and often a lot of tea has been rejected by one
buyer after another because it could not stand up
under the test of regulation 22, only to be finally
taken by some purchaser, on account of a conces-
sion in price, and on the chance that it might gain
admission here in spite of the law; a result much
sought after by some dealers in the United States
on account of the resulting financial profit.

And the respondents further aver that they have
at all times reexamined all tea duly brought before
them in accordance with the law as contained in
the Act of March 2, 1897, as put into effect by the 68
Secretary of the Treasury pursuant to express
authorization by means of the regulations in T. D.
33211 without knowing the name of the owner
thereof; that they employ no analysis in examining
tea except a chemical analysis, which experience
has shown to be accurate, certain and impartial in
its workings and results; to the end that only such
tea as is equal in purity, quality, and fitness for
consumption to the standards duly adopted may be
admitted to the commerce of the United States.

For a separate and second answer to the bill of
complaint, respondents aver that this court ought 69
not to take jurisdiction of the matters set forth
therein.

First, because said bill states no facts requiring
for the relief of complainants, the intervention of
a court of equity:

Second, because this court has no power to en-
join or control the acts and functions of the Board
of Tea Appeals, respondents, which is a tribunal
constituted of judicial officers of the United States,
and invested by statute with plenary power over
the subject matter of this suit.

Answer.

70 Third, because this court has no power to enjoin or control the discretion of the Secretary of the Treasury in matters committed to him by law; nor has the court jurisdiction to enjoin or control agencies and tribunals, established for carrying the law into effect.

Fourth, because this court has no jurisdiction in equity over any administrative officer at the suit of any complainant until such complainant shows that he has fully complied with the law and exhausted the remedies provided thereby.

71 Wherefore, respondents pray that it may be adjudged that complainants take nothing by their Bill; or in the alternative, that the Bill be dismissed and that said respondents be dismissed hence with their proper costs.

Dated, New York, March 10, 1914.

WM. L. WEMPLE,
Assistant Attorney General
Solicitor for Respondents
641 Washington Street,
New York, N. Y.

Testimony.

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UNITED STATES DISTRICT COURT**SOUTHERN DISTRICT OF NEW YORK.****Before Hon. CHARLES M. HOUGH, J.**

GEORGE H. MACY, OLIVER C.
MACY, GEORGE S. CLAPP, T.
RIDGWAY MACY and IRVING
K. HALL, doing business as
co-partners under the name
of CARTER, MACY & COM-
PANY,

Complainants,

vs.

GEORGE STEWART BROWN, E.
C. HAY and S. B. COOPER, as
general appraisers of the
United States designated by
the Secretary of the Treas-
ury of the United States as
the Tea Board,

Respondents.

In Equity.
11-85.

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75

NEW YORK, June 2, 1914.**Appearances:**

EVARTS, CHOATE & SHERMAN, Solicitors for
Complainants. JOSEPH H. CHOATE, JR.
and JAMES GARRETSON, of Counsel.

WILLIAM L. WEMPLE, Special Assistant At-
torney General, Solicitor for the Re-
spondents.

William Dallas.

76 Mr. Choate made an opening statement for the complainants.

Mr. Wemple made an opening statement for the respondents.

Mr. Wemple: The record will show that your Honor overrules my motions as to the jurisdiction, and allows me an exception?

The Court: I entertain the motions, and reserve decision.

WILLIAM DALLAS, a witness called on behalf of the Complainants, being duly sworn, testified as follows:

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DIRECT-EXAMINATION BY MR. CHOATE:

Q. Mr. Dallas, by whom are you employed? A. Carter, Macy & Company.

Q. In what business? A. Tea business.

Q. What sort of tea business do they do? A. An importing tea business, in all sorts of teas.

Q. Do they import large quantities of green tea? A. Yes, sir.

Q. How long have you been in the tea importing business? A. Over forty years.

Q. Are you familiar with the customs and usages of the tea trade? A. I am, yes, sir.

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Q. And have you been during those forty years? A. I have, yes, sir.

Q. Will you tell us what examination is made of teas, in accordance with the customs and usages of the tea trade, by persons engaged in the tea business? I mean, what examination for the purpose of testing the purity, quality and fitness for consumption of teas? A. We look at the leaf, and we put the leaf, the weight of a half dime, in a cup and pour boiling hot water on it; and we use our nose and our taste, and we look at the leaf up-

side down, turn it out of the cup and look for grit and all sorts of things, look for outside leaves, extraneous leaves. 79

Q. Do you make any particular examination for impurities of any kind? A. We do, yes, sir.

Q. Tell us what you do there, and how you do it? A. Well, after having the tea properly drawn, we turn the leaf over and examine the leaf and examine for any impurities we may find in the bottom of the cup and on the bottom of the leaf.

Q. Then do you make a further examination of a different weight of tea? A. We draw double then, if we have any suspicion of anything being 80 wrong with the tea.

Q. Then what do you look for? A. Look for the same thing, for dirt in the tea or grit in the tea or color in the tea, or false leaves, or anything of that kind.

Q. How does color show itself? A. It shows itself in a scum.

Q. Mr. Dallas, have you observed the process of the manufacture of green teas in China? A. I have, yes, sir.

Q. Will you tell us briefly, how the teas are grown and prepared for market? A. Well, the teas are grown on small bushes, three or four feet 81 high, and at the proper season are picked, taken into the Chinese hong, into their small houses or bungalows, and in most cases the tea is put in sieves over a large pot with boiling water, and steamed for a few minutes.

Q. Are they grown in large or small plantations? A. Small, very small.

Q. And is the preparation of the tea, the drying or firing or whatever it is called, done on the premises by the owner? A. On the premises.

Q. Why is that? A. Well, they are poor;

William Dallas.

82 they cannot afford to have any extensive premises; some of them, a great number of them, fire it and fix it up in the houses they sleep in.

Q. Is it not also because the green teas must be fired before the fermentation process takes place? A. Unquestionably, at once, yes, sir.

Q. Go on; describe the process to his Honor?

83 A. After the teas are steamed, they are then spread on the floor and dried to a certain extent, to dry the leaf. Then they are put in pans, so many pounds of tea in pans, and under each pan is a charcoal fire. They are fired for a certain number of minutes, according to the idea of the Chinaman, and a good deal according to the spring and winter, whether it has been a moist spring or a moist winter, all depending on that; they fire them sometimes from 29 to 35 minutes.

Q. Did you happen to observe the coloring process while you were there? A. I did, yes, sir.

Q. How is it done, and when and where? A. During the process of firing.

84 Q. How is it done? A. The Chinaman has a little tray, a little color on the corner of the tray, and a little knife like that spatula. He takes a little corner of the color on that knife, and dips the color in each pan.

Q. Then what does he do with the tea in the pan? A. The leaves are turned over by hand in the pan.

Q. How large is the pan? A. The quantity of tea generally put in a pan is five pounds.

Q. And how much color did you see put into five pounds? A. Well, it is almost invisible, it is so little; right on the corner of the knife, just a little speck on the corner of the knife.

Q. What form was that coloring matter in, was it liquid or powder? A. In a powder.

Q. What kind of a building are these operations

William Dallas.

generally conducted in? A. Buildings made of 85
clay and straw, and the inside of the buildings
is like an old mill, full of dust where they have
fired teas for generations in there. Dust is cling-
ing to the rafters, to the walls and to the floors.

Q. Are you familiar with the kind of examination
which was carried on by the examiners at the ports
until 1911? A. I have been, yes, sir.

Q. That is, the examinations for the purpose of
import of teas into this country under the Tea Law?
A. Exactly, yes, sir.

CROSS-EXAMINATION BY MR. WEMPLE:

Q. How long did you spend in China at the pe- 86
riod you are referring to, Mr. Dallas? A. I was
there at that time for two seasons.

Q. Continuously? A. For two seasons continu-
ously in those days, yes, sir.

Q. And over what parts of the country did you
travel? A. Well, I travelled a good deal over
China; I went all through the country up there,
shooting.

Q. Can you give us an idea how extensive your
travels were, how general your observations of tea
go-downs was? A. Well, I slept in them.

Q. How many tea farms did you inspect? A. 87
Well, I was not there specially inspecting tea
farms, Mr. Wemple; I was looking around, took
in all I could see while I was going around.

Q. Are there some extensive and well equipped
tea plants there, tea gardens? A. Well, some of
them are; some of them are better than others; of
course depending on the wealth of the Chinaman
who is handling the teas, some of those better chops.

Q. "Chop" meaning the product of a certain
farm, does it not? A. Yes, sir.

William Dallas.

83 Q. What kind of teas are you speaking about?

A. China green teas.

Q. Did you see the production of any Ping Suey teas? A. Yes, sir.

Q. Is there a difference between China tea and Ping Suey? A. Well, they are grown in different countries; one is grown in the low country and one is grown in the higher country.

Q. Which is grown in the low country? A. China greens.

Q. Did you inspect any of the places where the Ping Sueys are grown and prepared? A. Not specially, no.

89 Q. Did you inspect them as specially as you did the up country places? A. I didn't examine any of them specially; I simply looked at what I saw there. I simply passed through. The Ping Suey country is much nearer Shanghai.

Q. Then you can tell us as much about the Ping Suey country as you can about the green? A. The Ping Suey is the country where they don't use any color on green teas.

Q. They don't? A. No.

Q. How long since? A. For quite a number of years they have not.

90 Q. They used to use it, didn't they? A. They did, yes.

Q. They got over it? A. Well, you prohibit them bringing them in here.

Q. So they quit using it? A. The only country Ping Sueys come to is this country; China greens go to other countries where they use colored teas.

Q. Do you know what the purpose of this coloring matter they put in it is? A. Well, originally it was considered a preservative.

Q. And how is it now considered? A. What, sir?

William Dallas.

Q. What is the result of putting the color in now- 91
adays? A. Well, in the old days, your Honor——

The Court: What is the actual physical or
chemical result of putting the coloring matter
into the tea, during the process?

The Witness: Well, in those days the teas were
brought in long voyages by sailing ships, and it was
a preservative to teas in those days. In the old
days, when they used color so much in tea, it was
mostly brought here by sailors on long trips, and
the only question was a preservative for teas in
those days.

Q. Isn't the object of using it now to improve 92
the appearance of the tea? A. Well, more or less,
on the low grades.

Q. Just on the low grades? A. On the low
grades, yes.

Q. They are the grades that need it the most,
aren't they? A. I don't think so, no.

Q. In the Ping Suey country, did you see dirt in
the manufacturing places comparable with what
you saw in the other part? A. China is all dirt,
dirt all over China, both districts.

Q. You don't draw any distinction whatever be-
tween the dirt in the Ping Suey tea houses and that 93
up above? A. I don't think they clean themselves
any more often there than they did in the green
tea country.

Q. The best leaves, the highest grade of teas, I
suppose is that which is gathered from the young
and tender leaves, as they come out earlier in the
year, in the season? A. Exactly, yes.

Q. And as the season advances the leaves are
more hard? A. They grow tougher, yes.

Q. Yes, and not so perfect? A. Well, just—in
fact they are more perfect.

94 Q. But less desirable? A. Not as light liquor in the cup.

Q. As what? A. As light liquor in the cup.

Q. Do you know whether color is more commonly used on these later pickings or on the earlier pickings? A. Not at all. The later pickings, the leaf is handsomer and the cup is darker.

Q. So that the coloring matter is not needed on the later pickings so much as on the earlier ones?

A. No, it is not; there is no color necessary on either one.

95 Q. No color is necessary? A. So far as to improve the leaf especially on these earlier teas, no.

Q. I don't just exactly know what you intend to answer. Will you state that again? A. You asked me if it was necessary to put more color on the earlier leaves on account of them being less better looking than on the later leaf, I think that was it.

Q. Yes, what is your answer? A. My answer is it is not necessary to put color on either one of them.

Q. I see; they are perfectly good without the color? A. Exactly, yes.

96 Q. When tea leaves have been gathered from the bush, I suppose they are gathered into those flat wicker baskets, that we have seen pictures of? A. Baskets, yes, sir.

Q. And carried into the places where they are prepared? A. Yes, sir.

Q. What do they do with them when they get them there? A. They dump the leaves on the floor, and then they put them in this pot I speak of, where they are steamed.

Q. Is there something necessary about putting them on the floor; do they insist on putting them on the floor? A. Well, they have got no other place to put them; they are always crowded.

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Q. Then the floor is for that purpose, is it, just 97
like a thrashing floor? A. No, the family often
sleep on the floor, on the same floor as the leaves
are dumped on.

Q. This amount of coloring matter that is put in
is large enough to make some change in the appear-
ance of the leaf, isn't it; that is what they put it in
for? A. Oh, very little, yes.

Q. Well, a little bit is enough, isn't it? A. A
little bit is enough, yes.

Q. And they use it for that purpose; isn't it true
that more coloring matter appears in the later
pickings of tea, the later importations here, than 98
in the earlier? A. I don't think so, no, sir.

Q. Do you know anything about that? A. I do,
yes. You ask me if I know anything about it. That
is the fallacy that the present tea examiner we have
has, not knowing any better.

Q. Then in your opinion the later importations
of the tea here do not show greater amounts of
color than the earlier? A. I don't think so, no, sir.

The Court: Do you mean later in the same
season, or of late years, as compared with some
years ago?

Mr. Wemple: No, I am referring to the same 99
season, sir.

Q. Is that your understanding, Mr. Dallas, the
same season? A. The same season, yes.

Q. Later in the season? A. Exactly, yes, sir, the
later crop teas.

Q. You say you don't think so; I want to know
if you have any knowledge, any statistical knowl-
edge on the subject? A. That the later crop teas?

Q. That the teas that come in here later in the
season show more color than teas that come in

100 earlier in the season? A. You are speaking of the present time?

Q. Yes. A. There is neither the first crop or second or third crop coming in now; they all go to other countries, the colored teas.

Q. Well, certain teas do show color that are brought in here, do they not? A. Well, that depends on who examines them.

Q. You cannot see color in the tea unless it is there, can you, even under Regulation 22? A. Well, I have examined teas, Mr. Wemple, and found no color where the Government Examiner has
101 found color.

Q. That is quite possible, but you don't mean to say he found color that was not there, do you? A. Well, I did doubt it; I don't believe the color ever was there.

Q. I want to ask you one more question on these late and early teas. A. Yes, sir.

Q. Is it true that the earlier teas are the choicer ones, the teas gathered earlier in the season are choicer? A. Unquestionably, of every tea.

Q. When these tea leaves are gathered and taken into the house where they are manufactured, are they sifted in order to separate the teas of twigs and such things? A. There is no sifting done until
102 after the tea is fired.

Q. Well, at some stage they are sifted? A. They are sifted after the tea is fired.

Q. And in what manner is this sifting done? A. Through bamboo sieves, a good deal of it is done by girls who pick any extraneous pieces of sticks or that, out with their fingers.

Q. Yes, and are these sieves that they use so arranged as to sort the product into leaves of different sizes? A. Oh, yes, different kinds of tea; Gunpowder, Imperials, Hysons.

William Dallas.

Q. Well, speaking now of country green, if you please. A. Yes, those are country greens. 103

Q. And they make out of the country green products these different varieties? A. They do that, yes.

Q. And they do that by sifting the entire product into leaves of different sizes? A. Yes, sir.

Q. As if you were separating crushed stone into— A. (Interrupting) Different sizes.

Q. (Continuing) Stones of larger and smaller sizes? A. Exactly, yes, sir.

Q. The coloring that is used in tea is used to improve the style, is it, nowadays? A. Well, there is no color used in the teas nowadays that come here, to improve any style. 104

Q. Well, you spoke a while ago from the standpoint of China, and I was asking you from the standpoint of China, whether they use the coloring matter to improve the style of the leaf? A. They do, on teas that go to other countries, to Canada, to the Parsees, and to Asia and Europe.

Q. Well, wherever they use it they use it for that purpose? A. Sir?

Q. Wherever they use it they use it for that purpose? A. For that purpose, yes, sir.

Q. And do I understand you to say that they want to improve the style of the leaf on the late pickings or on the early pickings? A. No, sir, I said nothing of the kind; I said they used it to improve the style of the lower grades. 105

Q. Of the lower grades? A. Yes.

Q. Whether of late or early pickings? A. Exactly.

Q. So that if the late picking of tea is a lower grade than the early picking, it is used on that and for that purpose? A. That is, for those other countries; not for this country.

106 Q. They also do use this coloring matter on fine teas, so that they will look even finer? A. No, sir, it is not necessary to use coloring matter on fine teas; fine teas become fine during the firing.

Q. Now I ask if you know whether or not they do, on occasion, add coloring matter to fine teas, not coming to this country necessarily? A. They do, going to the Parsees I spoke of.

Q. To make them even finer? A. They get very handsome teas, and they have them very highly colored, the Parsees do.

107 Q. The cup test that you spoke of as being the custom of the trade, is used as I understand you for an examination into all of the dirt that is in the tea? A. Depending on what we are making the test for. If we make the test to find the value of the tea, we don't look for dirt in it, we simply value the tea.

Q. Assume you are using the cup test for all the purposes for which it is suited. You want to find out everything that you can find out about a given sample of tea. A. Exactly.

108 Q. And you test it in a cup. Now, you look at the result in the cup, as I understand you, to ascertain how much dirt there is in it. A. Teas, for examination purposes, that we buy must be standard tea against the United States standard teas, and even superior. When we value the tea for the street, I don't bother about anything but the tea.

Q. No matter how much dirt there is in it, you don't pay any attention to it? A. Well, we seldom see very much dirt.

Q. I am asking you now, I don't want to argue with you. In examining tea for values, do you disregard every extraneous thing that is in it in using the cup test? A. Well, if there is extraneous

matter in it, of course it injures the value, but you don't have to hunt up the tea all around your cup to find them. 109

Q. Then the cup test does show you how much dirt there is in the tea, does it? A. I could hardly explain what a tea tester can show from a cup of tea. There are ways of getting at it that come to you naturally. After long years of experience, you don't have to go and hunt all around the cup of tea to find out whether it is off or on or dirt in it.

Q. What is this custom of the trade you tell us you use that does show what the dirt in the tea is? 110
A. We never look for dirt in the tea when we are valuing it for the street, or putting values on it. When we buy the tea in Shanghai, then we do look for everything in it.

Q. Then let us refer to New York again. Is the result that in New York you don't use the cup test as a means of detecting any dirt in tea, because that tea has already been examined for dirt? A. Our buyers in Shanghai are supposed to be especially particular in examining everything they buy for dirt and everything else.

Q. Then it is a custom of the trade here, is it, to take tea upon the assumption that finding it here is pretty good evidence that it has been examined for purity, quality and fitness for consumption? 111
A. That is in the East, before it is bought.

Q. Yes. A. Exactly; the buyer is always careful of the tea.

Q. That is the custom here, isn't it? A. It is the custom here too, yes.

Q. Then every bit of tea that comes here is bought on the assumption that it passes the customs? A. Exactly.

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112 Q. Is that the general practice amongst the tea trade here, Mr. Dallas? A. To do what?

Q. Before the year 1911, was it the custom to buy tea to arrive in this country, on the guarantee that it would pass the customs, Mr. Dallas?

Mr. Choate: I object.

The Court: I think that is perfectly immaterial; objection sustained.

Mr. Wemple: Your Honor will allow me an exception.

113 The Court: Yes. Mr. Wemple that is simply glorifying bureaucracy. It substitutes the opinion of the Bureau for everything else. Of course, it may be that we will come to that in time, but we have not come to it yet. A man has got a right to say "I don't care what that bureau says, I say the law is thus and so, and I will thresh it out with them, and I will knock at the door of the bureau with something I say corresponds to the law, although they may not think the same."

114 Mr. Wemple: There is no contention, sir, that before 1911 any illegal methods were practiced, as I understand it, and if before 1911 there was a certain custom of this kind then my point is that it would be material. I only state that to make my position clear. I agree with your Honor that if an illegal method is set up which makes men conform to a habit, that does not become a custom.

Q. Before 1911, and as far back as 1897, Mr. Dallas, was it the custom of the tea trade to use the cup test in order to discover matter in merchandise known as tea which was not tea? A. Which was not tea?

Q. Yes, in other words dirt? A. Well, you

couldn't draw dirt from the cup; you have to have 115
a leaf.

Q. Yes, but don't you examine the leaves that
have been drawn? A. We certainly do, yes.

Q. In the cup? A. Yes.

Q. And that was the custom in New York and
other parts of the United States, that you ex-
amined those leaves in order to determine which
ones of them were tea leaves and which ones of
them were something else? A. Exactly, yes, sir.

Q. Then is it fair for me to conclude from your
statement that you did examine the drawn leaves
in a cup, after 1897, in order to discover dirt in 116
tea? A. Well, Mr. Wemple, you say dirt, and then
you say foreign leaves.

The Court: You can ask him whether prior
to 1911 so called cup tests were used for the
purpose of discovering in substances offered
as tea the presence of anything and everything
that was not undrawn tea leaves; what do you
say to that?

The Witness: Certainly. I never heard the
term dirt used in tea leaves.

The Court: You can call it candy, if you
like. 117

REDIRECT-EXAMINATION BY MR. CHOATE:

Q. What were the ordinary substances, not tea,
which you were in the habit of finding in tea in the
early days of the present Tea Law? A. Well, we
had willow leaves, we had tea that had been drawn
several times by the Chinamen; it mostly always
consisted of a foreign leaf of that kind.

Q. Were there any imitation leaves found in
Gunpowder leaves, things that were not leaves at
all but made up to represent leaves? A. In Gun-

William Dallas.

118 powder teas we even had tea dust dropped in a leaf and gummed in there, in the old days. They used gum to make Gunpowder tea so they would roll up.

Q. Did I understand you to say that the firing and sifting processes in China were done with the same implements in the case of colored teas and uncolored teas? A. Always the same; same floor and same everything, yes, sir.

RE-CROSS-EXAMINATION BY MR. WEMPLE:

Q. I thought you told me, Mr. Dallas, that you
119 didn't go into these manufacturing places for the purpose of inspecting what they used? A. I never said anything of the kind; I said I slept sometimes in them.

Q. Did you go into them generally, or only a few times? A. Yes, I have been around them for days at a time.

Q. How many did you go into in the course of your two years in China? A. I have been there more than two years, going back and forth.

Q. Well, all the time you were there. A. I wandered around the tea country there, I couldn't
120 tell you how many times I went in and out.

Q. How many different buildings for the preparation of tea did you go into while you were in China? A. Well, I couldn't tell you how many I went in. They are small buildings which go all over the country; it would be pretty hard to tell how many you went in or how many you didn't go in.

Q. You have no recollection of how many you went into? A. I have not, no.

Q. Did you go into a thousand? A. I would hardly say a thousand; probably in the last forty

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years I may have gone into a thousand, by going 121
into the same one a number of times; but I wouldn't
like to say.

Q. The last forty years? A. Yes, sir.

Q. Do you know whether they use the same sheds
in the Ping Suey country for making colored and
uncolored teas? A. The same sheds in what way,
the same sheds?

Q. I mean, do they have one shed for making
colored teas and another shed for making uncol-
ored teas? A. The Ping Suey district is 200 miles
from the green tea country district.

Q. Yes, but didn't you tell me you had been 122
there? A. Exactly, but they couldn't use the same
shed for both kinds of tea.

Q. I asked you the question, whether in the Ping
Suey country in making colored and uncolored
teas they use the same shed for both teas, or one
shed for colored and another shed near to it for the
uncolored? A. No, they used the same bungalow
or hong for both kinds in those days.

HENRY C. THORN, a witness called on behalf of
the Complainants, being duly sworn, testified as
follows:

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DIRECT-EXAMINATION BY MR. CHOATE:

Q. Mr. Thorn, what is your business? A. Tea
broker.

Q. How long have you been in that business?
A. I have been in the brokerage business about
twenty-two or twenty-three years; in the tea busi-
ness about thirty-three. I was not always in the
brokerage business, about twenty-three years as
a broker.

Q. Have you been familiar with the customs and

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124 usages of the tea trade in this country during that time? A. Entirely.

Q. Will you tell us what the method of examination in accordance with the customs and usages of the tea trade is, as to the examination of teas to determine their purity, quality and fitness for consumption? A. Well, you weigh them out in a scale, the weight of which is equivalent to the old fashioned silver five cent piece; I don't know what it is in grams. They put it in a cup, and they pour boiling water on it, and then after it stands for a few minutes we smell it, taste it, and if it is a high grade tea of any sort or description then we make
125 an accurate description of the infused leaf. Of course, if we are examining for the standard, then we look for the infused leaf too, no matter what grade of tea we are examining.

Q. Do you also examine a double weight? A. I examine certain classes of tea—

Q. I mean, when I say do you, is it customary to examine a double weight to complete the examination? A. In the tea trade?

Q. Yes. A. No, except a few used it in a certain class of tea, called Congo tea.

Q. What class is that? A. Congo tea, simply
126 to get the full flavor out of it; but the usage of the tea trade is single weight.

Q. Is there any other method of examination which is or has been customary to the tea trade? A. Never to my knowledge. Of course, I speak up to the time they sprung this so-called Read test.

Q. Yes, certainly. Mr. Thorn, have you any connection with Carter, Macy & Company, the complainants in this action? A. Absolutely none.

Q. Have you been in the habit of examining teas to determine their purity, quality and fitness for

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consumption, during your own experience in the tea business? A. Every season I have to do a great deal of it. 127

Q. And you do it professionally as a matter of business? A. I do it as a matter of business.

Q. Did you at my request examine samples of the green teas known as Q. U. I. 5, Q. U. I. 6 and Q. U. I. 7, which are referred to in the bill of complaint in this suit, in comparison with the Government's standards? A. I did.

Q. Provided for the purpose? A. I did.

Q. When did you make that examination? A. I think it was about a month ago. I can get the exact date. I remember I was sent for and handed samples, sealed samples, and got my own standards, United States Government standards. 128

Q. What standards were those? A. The Young Hyson and Gunpowder Standards.

Q. What year? A. Of last year, 1913 and 1914. The Young Hyson I brought from my own office unopened, and the Gunpowder, of course I had used it, but it was the Government's standard as I had used it all through the season.

Q. How did you make that examination and compare the Q. U. I. 5, Q. U. I. 6 and Q. U. I. 7 teas with the Government standards? A. I opened three tins that were handed to me sealed up. 129

Q. Handed to you by whom? A. By you, sealed. I broke the seals and weighed them out very carefully. I then weighed out the standards very carefully, and I then put the water on them myself. I smelled them, I tasted them, and I made as careful a comparison between these teas and the standards as I would had I been examining a common grade of tea.

Q. What have you to say about the comparative

130 degree of purity of these Q. U. I. teas and the Government standards?

Mr. Wemple: That is objected to as immaterial.

Mr. Choate: That is material only on the question of purity. We have got to show the teas would pass the test if it were legal.

The Court: Overruled.

Mr. Wemple: Exception. Of course, your Honor, these teas have been passed on this test by the Examiner; it is cumulative.

The Court: I will take the whole situation.

131 The Witness: The teas were absolutely as pure as any tea I have even seen, on our regular methods in the tea trade of examining teas, and of course they were so infinitely better in quality than the standards, if the standards are pure of course I cannot say they are purer than the standards, but for quality and everything else they exceeded the standards so greatly it was really a farce to make a critical examination of them, but I did so.

132 Q. Do you say the same about fitness for consumption? A. They are much more fit for consumption than the standards, because they are much higher grade of teas.

Q. What would you say the standards were fairly valued at, a pound? A. Oh, I should imagine about 10 to 10½, possibly 12 cents for the Young Hyson, and possibly 10 or 11 for the Gunpowder.

Q. Those prices are as of what market, this market here? A. The New York market, today's spot market.

Q. What would you say the corresponding value of the Q. U. I. 5, Q. U. I. 6 and Q. U. I. 7 teas that you examined were? A. Well, that I wouldn't

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exactly like to say under oath, as I did not examine them so carefully for that. I should say in a rough way, though, from 40 cents; they might be worth a great deal more than 40 cents, because one tea especially struck me as being one of the highest grade teas I have seen this season; and without putting the standard against it, I wouldn't care to specify exactly the price of that one. And I examined them on double weights for infusion. 133

Q. What was the purpose of that? A. To make sure, according to the old way we used to examine two or three teas together for the Government, using the double weight. That would double the amount of the sediment, and everything else that could show the tea as against the standards. 134

CROSS-EXAMINATION BY MR. WEMPLE:

Q. Did I understand you to say the double weight was not a custom of the trade? A. In weighing a Ceylon tea, the double weight is not the custom of the tea trade, no, sir.

Q. Without qualification, is it a custom or is it not? A. Well, you asked me a question. The manner that I have answered is the only way that a tea man can answer the question. If you mean in the custom of a tea broker's office, in the tea trade of the United States, is it customary to draw tea double weights, then I say absolutely no, it is not. 135

Q. Even after you have drawn single weights? A. Once in a great while, I explained once in a great while in treating very high grade Congo teas that are called English Breakfast teas; a few people do the same thing in treating Ceylon teas, they sometimes treat them double weights; I do, and others do.

Q. It was a method at least that was generally known to the tea trade? A. Double weights.

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136 Q. Yes. A. I should say it was a method that was practically unknown to the tea trade, until the standard law.

Q. Until the standard law, you mean, of 1883?

A. No, I mean the standard law of 1897. Double weights in the tea trade were not acknowledged; nothing but single weights.

137 Q. Is there anything in the law of 1897 that said a double weight should be used? A. I think it said it might. It might not have been in the law, it might have been in some regulations adopted afterwards, because they changed the regulations on us, they used to every year; in fact, we hardly knew where we were at at the time. Whether the original law said it or not I don't know, but I know later on we examined them for the United States double standard. I don't know whether it was in the law or the regulations adopted by the Board of so-called tea experts.

Q. Do you know how these regulations were prepared, whether under the advice of experts or not? A. I presume they were, yes, sir; I was not on the board.

The Witness: Can I ask a question, Mr. Wemple, simply to refresh my memory?

138 Mr. Wemple: Yes.

The Witness: Didn't three years ago the Treasury Department issue a notice that to comply with the customs and usages of the tea trade we should go back to using single weights in the original examination of teas that were beyond the question in coming in? Now whether they said anything about the question of using double weights I don't remember, but I think your question is answered, if my memory is correct, that the Treasury Department three years ago sent out a ruling that we should

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use in the examination the single weight, recognizing that as the custom of the trade. If I am not mistaken, I think that ruling was made. 139

Q. Is the use of double weights a more drastic examination than the single weight? A. Oh, it is bound to be, yes.

Q. In other words, you get a better idea of the purity of the tea? A. Any impurity would stand out, of course, a great deal in double the quantity, just the same as any fine flavor would stand out.

Q. What do you understand, as a tea trade expert, by the words "infusion in the cup", or some equivalent language? A. Why, I understand it simply to mean the wet leaf after you have poured the boiling water on it and let the tea draw out. 140

Mr. Choate: Let us get the question more definitely.

The Witness: You could not have infusion excepting in the cup.

Q. "Including the testing of an infusion of the same in boiling water"; is there any special limitation of the trade placed on those words? A. Will you ask me that again?

Q. Is there any special limitation placed by the tea trade upon the words "including an infusion of the same (meaning tea) in boiling water"? A. No, the infusion of the tea in boiling water is after the proper weight is put in the cup, pouring the boiling water on it and letting the tea draw out. 141

Q. What is there in that language that gives you the idea of a proper weight being put in the cup?

Mr. Choate: I object to that, "what is there in that language" is not a question which the witness is called upon to answer.

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The Court: No, I don't think it is.

The Witness: Why, that proper weight—

Mr. Choate: One moment; the objection is sustained.

Mr. Wemple: My object in asking that question, sir, is that this witness has been called here as an expert on usages and customs. Now he gives me an answer which seems to limit in an arbitrary way the use of certain language of plain meaning, and I want to ask him if there is anything in the usages and customs with which he is familiar which does so limit it.

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The Court: I cannot follow that, Mr. Wemple. For the life of me I cannot see what great difference it makes whether they take the weight of a half dime or the weight of a dime. I can see it would make it more easy to study the results from a larger quantity of tea.

Mr. Wemple: I assume it would make some difference in the regulations the Secretary could adopt if the language which I quoted had a certain arbitrary limitation on it, than if you could use any weight, and I want to guard against the record apparently showing testimony that indicates such a limitation.

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The Court: I understand Mr. Thorn said that the ordinary quantity used in the tea trade for the purpose of making tea was the weight of a silver half dime.

The Witness: That was adopted—well, when I entered the business over thirty years ago, and that has always been universal. In selling tea in different cities, different parts of the country, we are used to using the same weight, and it has been the universal weight. Some people may use a little heavier in their

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own place, but that is the usual weight used in the tea trade as far as I know. 145

Q. Is it true that the double weight is used in testing for purity, and the single weight for quality? A. Not in my office, or in my experience.

Q. Not in your experience? A. Excepting, as I say, when we were told to examine teas under a government regulation which said we must use double weights, but if a man showed me tea in my office I would draw it single weight, and I would go on single weights, I think, with one exception, of the highest class of tea, where I wanted to get the full flavor. 146

Q. Has the fact that tea that you find in your business has passed the customs, any weight with you in using or not using the double weight, the double quantity for the infusion? A. Absolutely none. I don't go on the customs passing it or not; I mean, I have to go on my own judgment, as I do on everything else. I don't take the customs.

By the Court:

Q. You spoke of comparing the tea mentioned in the bill of complaint with the standard. I understood you took some of the tea mentioned in the bill, and made tea of it, and you did the same with the standard? A. Yes, sir. 147

Q. Well, can any gentleman go around and get a piece of the standard, get a sample of the standard whenever he wants to? A. Well, every importer is allowed by the Government, we pay for them, two sets of standards; a broker is allowed six, so that we can send ours out to our people in the East, and anybody can buy from the Government a pound or half pound, whatever it is.

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- 148 Q. The government keeps a retail grocery store to that extent? A. For tea only, that is all; but we all have to have those standards as part of our tools.

By Mr. Wemple:

Q. If you should get a mail sample, or a sample from abroad would you test it by the single weight or the double weight? A. Why, I thought I had answered that question. I test everything by single weights. It is very seldom I use the double weight in my office.

- 149 Q. Well, I am asking you about a particular instance. A. Whatever you have, as I say, with the exception that if I get a sample of the highest grade of a Congo tea, I might treat that double weights to make sure of the quality; but in 999 samples out of a thousand that would come into my office, and we receive them on every mail that comes in from the East during the season, I draw them always single weights. Double weight is practically an unknown quantity in my office. Whether I am a back number or not I don't know, but that is my bringing up.

- 150 Mr. Choate: Before Mr. Deghuee takes the stand, there is a question about the Treasury decisions. I don't know whether your Honor will take judicial notice of them or whether you want them offered in evidence.

The Court: What are they?

Mr. Choate: Treasury decisions.

The Court: I will take notice of them.

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JOSEPH A. DEGHUÉE, Ph. D., a witness called on 151
behalf of the complainants, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. CHOATE:

Q. Mr. Deghuce, what is your business? A. I am a consulting chemist.

Q. How long have you been in that business? A. I have been a chemist for twenty-four years.

Q. Will you state in a general way your training and experience? A. I am a graduate of Columbia University——

Mr. Wemple: I will admit he is qualified, 152
if that will save any time.

Q. You are now in charge of the Lederle Laboratories? A. I am president of the Lederle Laboratories, and director of the Department of Chemistry.

Q. Will you state in a general way the experience you have had as a chemist in regard to tea? A. I have been familiar with the examination of tea practically ever since I graduated from Columbia University in 1890. I have made a particular study of tea and the testing of tea in the last four years, I should say. I have made a specialty during all my professional career, of food chemistry in general, which would include the examination of tea. 153

Q. Were you a witness in the proceeding before the Board of General Appraisers on the validity of the Read test? A. I was.

Q. For which side did you appear? A. For Carter, Macy & Co.

Q. For Carter, Macy & Co., the present complainant. Are you familiar with the regulations established by treasury decision 33,211, on Feb-

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154 ruary 24, 1913, by the Treasury Department for the examination of teas? A. I am.

Q. Have you carefully read over the method of examination prescribed by those regulations? A. I have, repeatedly.

Q. Have you yourself performed the examination of teas in accordance with those methods? A. A number of times, yes.

Q. Now, will you state whether in your opinion the method prescribed in Regulation 22 of those regulations, constitutes a test of the purity, quality or fitness for consumption of the tea examined
155 thereby in comparison with standard teas, or any other teas whatever examined in the same way? A. It does not.

Q. Will you state why? A. The method prescribed, the so-called Read test, is a test which merely detects particles of blue coloring matter which may be present in a tea, provided they are present in physical condition, that is the size particularly, in which they can be detected in that manner, and ignores the possible presence of all other impurities in the tea.

Q. Is the test in accordance with regulation 22 capable of showing the existence in the tea ex-
156 amined of any impurity other than a pigment or coloring matter? A. Including the so-called facings if you call the white material a coloring matter, it is not.

Q. It is capable only of detecting coloring or facing matters? A. Coloring or facing matter.

Q. That is blue or white or black pigments? A. Blue or white coloring, yes, sir.

Q. If, then, the standard contains other impurities than coloring or facing and the tea offered for examination, the tea offered for import, also contains impurities of some sort, color or other, does

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the regulation 22 method give you any possible means of determining which contains the greater amount of impurities? A. It does not. 157

Q. If the standard contains impurity and the import contains impurity, regulation 22 gives you no method for determining which contains the greater amount of impurity? A. It does not.

Q. Does the regulation method prescribed by Regulation 22 provide a test of the absolute purity or quality or fitness for consumption of the tea? A. It does not.

Q. Does the Read test, or rather the regulation 22 test, give you any quantitative results at all? A. No. 158

Q. Does it enable you to tell in any respect how much color there is in the tea under examination, if there is any color? A. It does not.

Q. Does the Read test, the regulation 22 test, detect very small quantities of color present in the tea? A. It depends altogether on what order of number we call a small quantity. It does detect very small quantities, but there may be still smaller quantities present which it does not detect.

Q. And may there be considerable quantities present which it does not detect, if present in the proper form? A. There may be considerable quantities of coloring matter present, and the Read test would not detect it. 159

Q. How small quantities have you personally observed to be detectable by the regulation 22 test? A. Well, I have in mind an actual sample which gave a Read test, which contained an estimated amount of one part in more than 2,000,000 of tea; one part of coloring matter to more than 2,000,000 of the tea.

Q. Can you put that in grains to the pound?

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160 A. That would be one grain in more than 300 pounds.

Q. 1/300ths of a grain to a pound; about how much coloring matter, what proportion of coloring matter do you understand to be present in really colored teas? A. About one part in 50,000.

Q. And that amount is what, in grains to the pound? A. There are 7,000 grains in a pound, that would be one in about 7 pounds.

161 The Court: Do I understand from that, Doctor, that if one grain of Prussian Blue were put into a receptacle containing 7 pounds of tea, while that receptacle is heated, would that Prussian Blue really cause a visible change in the color of the 7 pounds of tea?

The Witness: It will, if the tea is stirred.

Q. Did you at my request perform some experiments by adding small quantities of coloring matter to uncolored teas, Government Standard teas, in order to determine what they would show under the Read test? A. I did.

162 Q. Now, Dr. Deghuée, did you make an examination of the samples of the teas known as Q. U. I. 5, Q. U. I. 6 and Q. U. I. 7, submitted to you by me personally? A. I did.

Q. Did you make such an examination by chemical analysis in comparison with the Government's standards? A. I did.

Q. Which Government standards were those? A. The No. 5 and 6, Nos. 5 and 6. One is gunpowder and the other Young Hyson; I don't know which number belongs to which.

Q. Of 1913 and 1914? A. Of the 1913 and 1914 standards.

Q. Were those submitted to you in the sealed packages? A. They were.

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Q. And opened by you? A. They were. 163

Q. Did you examine both the government standard teas and the Q. U. I. 5, 6 and 7 teas, by means of chemical analysis, to determine the total contents of foreign matter in each, as far as you could?

A. As far as I could. The total content of foreign matter of a certain kind.

Q. Of what kind? A. The total amount of material, heavy material, not tea leaves, and the total amount of foreign mineral matter.

Q. Of foreign mineral matter? A. Of foreign mineral matter.

Q. Which did you find to contain the least total foreign matter, so far as you were able to ascertain its existence, the government standards or the Q. U. I. 5, 6 and 7 teas? 164

Mr. Wemple: That is objected to as immaterial. In this case the teas have been examined and have passed, and will not be examined again, all purity tests excepting just this for the particular kind of impurity, namely, blue, and the question is not directed to that.

The Court: I don't see why the record should contain this.

Mr. Choate: Why it should? 165

The Court: It has already been shown, by other evidence, that Q. U. I. 5, 6 and 7 are good. I think any learned man in the tea trade would say that. I have listened to that. Now you have given your tea a good character. Now you say, this tea may have this infinitesimal quantity of coloring matter in it, and so they are going to reject it. The question that you ask all goes to create the impres-

166 sion in the Court's mind that it is really good tea, but I have got that already.

Mr. Choate: I take it, your Honor, that I am obliged to show, or may be obliged to show, somebody may think some day that I am obliged to show, that my teas if examined in the legal method would pass, otherwise I am not entitled to an injunction. I have shown that by the customs of the tea trade, now I think I am obliged to show it as regards chemical analysis. Also, it has a bearing as showing the very large proportion of other impurities present in most teas, particularly in the government standards, as compared to the amount of color contained in our teas. That is a very important feature of this case.

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The Court: As I understand it, you desire to show that these particular teas——

Mr. Choate (Continuing) Have less foreign matter.

The Court (Continuing) Contained in your bill of complaint have survived that kind of a chemical analysis which would be approved of according to the customs and usages of the tea trade.

168 Mr. Choate: Yes, and that kind of a chemical analysis which would detect the total foreign matter in tea, which is what I conceive to be the meaning of the word "impurity" in the statute.

Mr. Wemple: My trouble with that is that, so far as it is directed to these particular teas, he has not availed himself yet of the statutory remedies.

The Court: I know, but that is a question of law that we have to pass upon entirely irrespective of the evidence; but if Mr. Choate

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is right, I think it is probably true that he might be called upon to show that these particular teas have survived or would have survived a chemical analysis. 169

Mr. Choate: Somebody might say yes.

The Court: As well as the tea making test. You may take your answer.

Mr. Wemple: I except.

(Pending question read.)

A. The Q. U. I. 5 and 6 and 7 contained less than the Government standards, very materially less.

Q. When you say less you mean less other material than tea? A. Less foreign material of this type. 170

Q. And you include in both cases the color which may have been present in each? A. I include the color that may be present in each.

Q. Mr. Deghuee, did the government standards which you examined show any color under the test by regulation 22? A. They did not.

Q. Did you make a further examination of them to find out whether they contained color? A. I did.

Q. What did you find? A. I found that both samples contained color.

Q. About how many particles of color did you find under the microscope? A. I found approximately 600 particles in the two ounces which is prescribed by the government regulations. 171

Q. That is in the government standard teas? A. In the government standard teas.

Q. Were you able to determine how much color there was in the Q. U. I. 5, Q. U. I. 6 and Q. U. I. 7 samples? A. Approximately, yes.

Q. That is, can you give us a figure which it did not exceed? A. It did not exceed—they varied a little; the largest amount which I found did not exceed one part in over a million.

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172 Q. One part in over a million? A. Yes.

Q. Have you prepared tubes showing the total quantity of foreign matter discovered by you in equivalent quantities of government standard teas and the Q. U. I. 5 teas? A. I have.

Q. Are the tubes attached to the card which I now hand you the tubes of which you have spoken? A. Yes, they are attached to the cards and labeled as to what they represent.

173 The Court: As I understand you, Doctor, you have conducted experiments in order to find out the comparative quantities of coloring matter which you could extract from or discover in both the Q. U. I. teas and the government standards?

The Witness: I have.

The Court: With the result, as I understand you, that without expressing any opinion as to whether the presence of coloring matter is an impurity, or not, but treating coloring matter as merely a substance, that there was a great deal more of that substance in the government standard than there was in the Q. U. I. teas?

174 The Witness: Not speaking of the coloring matter.

The Court: Oh, not speaking of the coloring matter?

The Witness: Not speaking of the coloring matter as distinguished from other impurities.

Q. As I understand it, Dr. Deghuée, you found some coloring matter in the government standards?

A. I did, yes.

Q. And more coloring matter in the Q. U. I. teas?

A. In the Q. U. I. samples, yes.

Q. But the amount in the Q. U. I. teas was less

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than one in a million parts? A. It was less than one in a million parts, yes, the largest quantity. 175

Q. And the total quantity of impurities, counting in color and every other foreign matter that you were able to find, by the chemical test was greater in the government standards than in the Q. U. I. 5, 6 and 7 teas? A. Yes, that is correct.

Q. Now, referring again to the card on which these tubes are mounted, will you state in turn what each of these numbered tubes contain? State for the record? A. No. 1 represents the United States Government standard No. 6, 100 grams of which had been shaken with carbon tetra-chloride, centrifuged, the sediment dried and burned to an ash. No. 1 represents that ash obtained from 100 grams of the tea. 176

Q. That is the total ash? A. The total ash from the sediment, not from the tea.

Q. It includes, of course—— A. (Interrupting) The sediment not being tea.

Q. That includes, of course, such ash as consisted of the burned up tea which may have been in the sediment, if there was any? A. Yes, if there was any dead tea leaf or burned tea leaf, which had settled with the sediment, this would include the ash from that tea leaf. 177

No. 2 represents the ash obtained from 5 grams of the tea leaf which had not settled, which was not in the sediment. That is, one-twentieth the quantity represented in tube No. 1 of tea, is represented in No. 2, which gives an estimate of the amount of ash which might be in the No. 1 obtained from dead tea leaves.

Q. Will you point out to his Honor which tube representing Q. U. I. 5 fairly is to be compared with the similar tube representing United States Government standard No. 1; or rather tube No.

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178 1? A. United States Government standard No. 5. No. 7 represents the United States Government standard No. 5, the sediment treated as I have described. No. 8 represents the sediment obtained in precisely the same manner from the same amount of tea, in Q. U. I. 5.

Q. So that tube No. 8—— A. (Interrupting) They are strictly comparable.

Q. That is the unburned, unashed sediment? A. That is the unashed sediment.

Q. So that tube No. 8, which contains less than half the total quantity of material that is in tube No. 7, is the sediment from the same quantity of
179 Q. U. I. 5? A. Of Q. U. I. 5.

Q. As was used to obtain the sediment shown in tube No. 7 from the government standard? A. Yes, sir.

Q. The other tubes attached to this card are correctly described by the legends under them? A. They are.

Mr. Choate: Then I will offer the card and all the tubes in evidence.

The Court: They may be admitted.

Marked Complainant's Exhibit No. 1.

180 Q. Doctor, is the test prescribed by regulation 22, in your opinion, a method of testing the purity, quality and fitness for consumption of teas in comparison with standard teas by chemical analysis?

Mr. Wemple: Wait a minute. I object to that question as improper in form, immaterial to the case.

The Court: I will substitute for the question, this question, Doctor: Whether Section 22 of the regulations does or does not, by chemical analysis, furnish any method of de-

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termining the purity, quality and fitness for 181
consumption of tea.

Mr. Choate: I should like to add there, in
comparison with the purity, quality and fit-
ness for consumption of the government
standards.

The Court: I ask this question first; does
it, by chemical analysis?

The Witness: It does not.

Q. Now will you state why not?

Mr. Wemple: I object to that.

The Court: Yes, he can say why not.

Mr. Wemple: Exception. 182

The Witness: It was simply a method for
detecting the possible presence of particles
of a blue coloring matter, ignoring all other
possible impurities. It is not quantitative, a
mere trace of a blue coloring matter might be
detected by this test, which would give no
basis for judgment of the tea as to its purity,
quality or fitness for consumption.

The Court: Mr. Choate, according to your
theory, if this section 22 does not furnish a
method of judging of fitness and purity by
chemical analysis, then it does not furnish 183
any method at all.

Mr. Choate: Yes.

The Court: And the greater includes all
the parts.

Mr. Choate: Certainly.

The Court: But I do gather, from what
Dr. Deghuée says, that the Read test, or Sec-
tion 22, does furnish a method of detecting the
presence of even an extremely microscopic
proportion of blue coloring matter in the tea.
Am I right in that?

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184 The Witness: It may or may not. It may under certain circumstances detect minute cases of blue coloring, but there may be considerably more blue coloring matter present than the Read test would show.

 The Court: Why not?

 The Witness: Because the Read test only detects the comparatively large, microscopically-speaking, comparatively large particles; and if it so happens that the tea is full of small particles, the absolute amount may be far greater than in other tea where the Read test would detect the blue coloring, on account of the comparatively small magnification and the crudeness of the test.

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NEW YORK, June 3, 1914.

JOSEPH A. DEGHUÉE, resumed the stand.

DIRECT-EXAMINATION CONTINUED BY MR. CHOATE:

186 Q. Dr. Deghuee, does the method prescribed by regulation 22 prescribe a test of anything by chemical analysis? A. It does not.

 Q. Will you explain to us why that is so? A. The regulation prescribes a mechanical separation of dust from the tea, and provides that if certain blue particles appear on the sheets of paper, after pressing the dust against the sheet of paper, that these sheets shall be sent to a chemist, and after identification by the chemist the tea shall be excluded or admitted, or rather excluded in that case; nothing is mentioned about the chemical analysis, or what the chemist is to do.

 Q. Do you recall that at the time of the proceed-

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ings before the general appraisers, when the question before the board was whether the Read test as originally prescribed, as prescribed at that time, was or was not a chemical analysis pure and simple — A. Yes. 187

Q. (Continuing) Without reference to whether or not it was a test for anything in particular — A. Yes.

Q. (Continuing) The provision requiring the spots on the paper to be sent to a chemist for identification were not contained in the regulations? A. They were not at that time.

Q. What kind of an examination did the regulations at that time provide? A. A purely mechanical examination, or physical. 188

Q. And is that examination the same as the examination required by regulation 22 as it now stands, up to the point where the sheets containing the blue specks are sent to the chemist? A. Substantially, yes; I think even verbatim.

By the Court:

Q. As I understand you, Doctor, after this proceeding which you call mechanical has been gone through with, it doesn't require anything that you call a chemical analysis to enable the investigator to recognize the blue marks on the paper as being caused by Prussian blue, is that true? A. No, I didn't mean to say that. I meant to say that the regulations did not prescribe that the chemist to whom these sheets were sent should do anything which could be called a chemical analysis. 189

Q. Put it this way, is it or is it not true that the person to whom such a sheet of paper as has been shown to me, in this case exhibiting brown stains and blue marks, would that person require a chemical education to know what those little blue

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190 marks meant? A. Possibly not; some of the witnesses for the Government in the case referred to, testified that they were able to identify these blue specks by mere visual inspection.

By Mr. Choate:

Q. So that if that was possible, if that identification were possible by mere visual inspection, no chemical analysis of any sort would be required to complete the method prescribed by regulation 22? A. It would not.

191 Q. Again, doctor, assuming for a moment that the sheet, after it goes to the chemist, is chemically analyzed, would that affect your answer to my question whether the method required a test of anything by chemical analysis? A. It would not.

Q. Why? A. Because the test for purity, if it is a test for purity, or the test for the presence of foreign matter, foreign blue matter, in the tea, is completed at the end of the mechanical analysis. The identification of those specks, even if made by chemical analysis, in the first place will be a chemical analysis of the blue specks, and in the second place —

192 Q. You mean of the blue specks, and not of the tea? A. And not of the tea. And in the second place, it would not affect the result in the least. The fact of whether that particular blue speck is Prussian blue or indigo or ultramarine does not affect the final result in the least; that is a useless addition to the examination, since it is not a question of condemning the tea or excluding the tea if it is one of those colors and not one of the others. The tea is excluded whether or not it is any of them.

Q. Do you think it important that the chemical

analysis, if any, is an analysis of the speck and not of the tea? If so, why? A. Well, largely for the reason I have already stated, and because the term chemical analysis of tea is a term that has been generally accepted to mean a particular thing, which means a real analysis, a really chemical analysis of the tea itself. 193

Q. Passing that subject for the moment, what I want you to say is this, is an analysis of such a speck as is furnished by the Read test an analysis of a substance representative of the tea from which it is derived, if it is derived? A. I cannot say that I understand your question, Mr. Choate. 194

Q. Perhaps I could put it more simply. Is a chemical analysis of the specks produced by the Read test, capable of producing, or will it produce, the same result as an analysis of the tea itself? Is the one fairly representative of the other? A. No, it will not.

Q. Why not? A. Well, a chemical analysis of the specks can be made on the specks themselves by the application of certain re-agents. There is no method known by which that same result can be obtained, that is the identification of ultra-marine for instance, by means of a chemical analysis of the tea; that is, starting with the tea itself and making a truly chemical separation of that coloring matter. 195

Q. You still have not answered in regard to the point that I was particularly anxious to get your answer about. I mean, are the specks on the Read test sheet in any sense truly representative of the composition of the tea, so that an examination of the specks, an analysis of the specks, will give any information as to the composition of the tea? A. Well, not at all, for the simple reason that they are not part of the tea at all. The tea is composed

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196 of certain ingredients known to be present in tea leaf.

Q. Now, doctor, you have stated that the chemical analysis of tea has had a definite form of meaning in scientific circles? A. Yes.

Q. Have you examined the various scientific works on the subject, published in 1897 or earlier?

A. I have, examined a number of them.

Q. Do those works contain passages devoted to the chemical analysis of teas? A. The works that I examined were works on food analysis, published prior to 1897, and included among other foods tea and the analysis of tea.

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The Court: Mr. Choate, what is there important about the year 1897? I observe that is the year in which the statute was passed. What has that got to do with it?

Mr. Choate: Merely in some respects, the meaning of words has changed since that time, the scientific meaning for instance of the words chemical analysis I think has been considerably broadened; not the meaning in ordinary everyday life.

The Court: What inference do you draw from that?

198

Mr. Choate: Well, from the particular evidence I am now offering I expect to draw the inference that a chemical analysis of tea was a well understood thing at the time the statute was passed, and it referred invariably to a general chemical analysis intended to tell what the tea was made of.

The Court: All the questions which you have asked from Dr. Deghuée are in the present tense.

Mr. Choate: Up to this time, that is true.

The Court: So that he has said that nothing

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that is suggested by the 22nd article of the regulations constitutes a chemical analysis. Now I am prepared to rule, and do, that if the phrase "chemical analysis" broadened with the passing years, the act of 1897 broadens with it. And you may take an exception to that ruling. 199

Mr. Choate: That will satisfy me perfectly, if your Honor chooses to put it on that basis. Then my exception will be noted without any further request for a ruling on that subject.

The Court: Yes, I will save your rights.

Q. Will you state in a general way what sort of a process these works outline, when they deal with the chemical analysis of tea? A. The chemical analysis of tea is generally understood in works on food analysis and by food chemists to cover the analysis of tea to determine its normal ingredients, whether they are present in excessive amount or present in deficient amount, and also examinations for foreign matter. They would cover the amount of extractive matter in tea, the moisture as a rule, the amount of ash, the amount of sand or insoluble ash, the amount of caffeine, the amount of tannin. Those would be about the usual determinations made, and a general examination for foreign matter. 200 201

Q. In short, the chemical analysis described in those works, if carried out, would give you general information as to what was in the tea and how much of it? A. Yes.

Q. Have you prepared an abstract of these various works of which you have spoken? A. I have, yes.

Q. Have you it with you in your hands? If so,

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202 I will offer it in evidence. A. I have it with me (Produces paper).

Marked Complainants' Exhibit No. 2.

Q. Doctor, returning to the nature of the regulation 22 test, up to the point where the blue specks are produced on the sheet, you say that that is a mechanical analysis? A. Purely mechanical.

Q. Is the phrase "mechanical analysis" a phrase well understood in scientific circles? A. Yes, it is.

Q. With a definite meaning? A. It has.

203 Q. Is it used in government publications? A. It is, yes.

Q. Will you state the distinction between the mechanical analysis and the chemical analysis? A. A mechanical analysis is a separation of a material into constituent parts by purely mechanical means. A chemical analysis is a separation of a material into its constituent parts either by means of chemicals or by splitting a material into other chemical compounds, or the term "chemical analysis" has been broadened to mean any kind of separation of a material into constituent parts by means of the application of chemicals, in addition

204 to the separation of chemical constituents.

Q. Must the separation be actually physically made, or may it be made in an imaginary manner, as by the spectroscope or the polariscope? A. In some kinds of chemical analysis, the material is not actually separated into its constituent parts in the physical sense, that is, in having the parts actually physically separated. By means of chemical re-agents, so-called, the fact that certain constituents are present in the compound is determined, and the separation is in a sense a purely mental one.

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Q. In testifying yesterday you stated that the regulation 22 test gave no quantitative information, either as to the sample examined or as to the standards. Have you yourself noticed differences between the results obtained by this test on two samples of the same tea, out of the same container? 205
A. I have.

Q. Were those differences wide? A. Very wide.

Q. Can you state how wide? A. They are extremely wide. Sometimes one sample of two ounces taken will show only a few specks, say half a dozen; another sample may show several times as many.

Q. Did you at my request make some experiments by coloring teas artificially? A. I did. 206

Q. And afterwards Read testing them? A. I did.

Q. How much color did you put in those teas? A. One part in fifty thousand.

Q. Was one of these experiments carried on in your laboratory in my presence? A. It was, yes.

Q. What was the tea which we colored on that occasion? A. One of the government samples.

Q. A government standard, from a tin opened by you? A. Yes.

Q. Have you the Read test sheet which we made of that tea afterwards? A. I have. 207

Q. Will you produce it, please? A. This is the sheet (Producing paper).

Mr. Choate: I will offer that in evidence. It has a bearing on the efficacy of the thing as a test of anything.

The Court: It may be admitted.

Mr. Wemple: Exception.

Marked Complainants' Exhibit 3.

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208 Q. On another occasion did you also color some Young Hyson teas with one part in fifty thousand, and make a Read test of that tea? A. I did.

Q. Were these teas colored with the same coloring matter? A. This particular one that I am referring to now is colored with indigo.

Q. Well, have you one which we made on the same day, prepared with the same coloring matter as the exhibit 3 which has just been offered in evidence? A. Yes, I have one colored with Prussian Blue.

209 Q. If you will produce that I will offer it in evidence. A. (Producing paper) This is a sample colored with Prussian Blue.

Mr. Choate: I offer that in evidence.

Marked Complainants' Exhibit No. 4.

Q. Have you one prepared with one part in fifty thousand of indigo? A. I have; this one (producing paper).

Mr. Choate: I will offer that in evidence.

The Witness: That has four or five specks on it.

Marked Complainants' Exhibit No. 5.

210 Mr. Choate: There, if your Honor please (handing paper to Court), I will show you 4 and 5 colored with the same quantity of similar coloring matters.

The Court: You may note your objection, which is overruled, and your exception.

Mr. Wemple: Yes, sir.

Q. Dr. Deghuee, what sort of coloring matters are used in teas, so far as you know, that appear in teas, I should say? A. Indigo, ultramarine and Prussian Blue are the common colors that are used. So far as my experience goes, I have found only

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ultramarine and Prussian Blue; I never had any 211
indigo.

Q. What, for example, did you find in the government standards which you examined, and the results of which were shown on Complainants' Exhibit 1? A. They contained both ultramarine and Prussian Blue.

Q. Both? A. Both.

Q. Are any of these coloring matters harmful?

A. No, not even in very material quantities.

Q. What have you to say as to their effect—

The Court: One moment. Mr. Wemple, let me ask whether it can or cannot be admitted, 212
either as an actual fact or as something that the defense is not prepared to controvert by evidence, that the insertion into the human body of quite perceptible quantities of either Prussian Blue or indigo is not harmful?

Mr. Wemple: It is not known, sir, whether it is harmful or not.

The Court: Then it is a thing as to which the defense is not prepared to offer affirmative evidence to show that it is harmful.

Mr. Wemple: That is right, sir.

Q. Why are these coloring matters not harmful 213
to the human body? A. Well, they are harmless from the nature of the coloring matter itself. In the first place, they are insoluble.

Q. So that they don't pass into the system if taken into the body? A. They don't pass into the system if they are taken into the body, and the nature of the color itself is a harmless one; that is, they are chemically harmless even in material quantity, and in the quantities present in the teas the amounts are so minute that even if they were

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214 violent poisons the amount is so small that they would be harmless.

The Court: Doctor, can you give us a practical illustration?

215 The Witness: For instance, it is a well known fact that arsenic, which is an acknowledged violent poison, is present in food products generally, and the government has placed a limit, a permissible limit upon the amount of arsenic which may be present in a food product and pass tests for purity; and that limit is one part in seven hundred thousand; one part of arsenic in seven hundred thousand. Now the tests show in these teas that there is less than a part in a million of this coloring matter present, which is less than the permissible limit of a violent poison such as arsenic. Consequently, even if these colors were as poisonous as arsenic, they would still be considered harmless.

CROSS-EXAMINATION BY MR. WEMPLE:

216 Q. Have you ever ascertained the effect of the gastric juices or other juices of the alimentary canal upon Prussian Blue, doctor? A. The gastric juice could not have any effect on Prussian Blue at all.

Q. I asked you whether you have or not? A. I know the nature of the digestive fluids, and can judge, as a chemist, as to whether they would have any action on the canal.

Q. Just listen to my question, please, and tell me whether you have done as I asked you. Read it, please. (First question on cross-examination read.) A. I have never personally made experiments on the action, but I have read literature on the subject.

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Q. Are there any insoluble poisons which enter the body, that is insoluble in water, which have a deleterious effect upon health? A. Yes. 217

Q. Are you able to say whether any experiments have been continued over a long period of time, in order to ascertain the effect of repeated injections of Prussian Blue into the system?

Mr. Choate: I object to that, because injections are not possible, I suppose.

The Court: I sustain the objection to that. I will not let him testify, because it is now admitted that it is not known whether there is any deleterious effect on the human system by the consumption or swallowing of Prussian Blue or indigo, and I don't think it is material anyway. 218

Mr. Wemple: Well, I don't either. The other side went into it.

The Court: But for your purposes that goes out.

Mr. Wemple: I understood the doctor to say a while ago, very categorically, that it did not have any deleterious effect.

The Court: That is his own opinion. He says it hasn't, and you are not prepared to prove affirmatively that it has. 219

Mr. Wemple: But what I believe is, that I think he will not adhere to that if I ask him this question.

The Court: I will go further, and anybody can take exception to this proposition of law if they don't like it, that it is not necessary for the Congress of the United States to lay down in a statute that an article of food or drink shall be excluded from the country only because it is deleterious to human health or life. If Congress doesn't want to have the peo-

220 ple of the United States eat a certain thing they can say so, that is not produced in the United States, and they can exclude it from the United States, as they have excluded it.

Mr. Wemple: That is satisfactory.

Mr. Choate: Of course that is satisfactory to us, your Honor, but your Honor will also remember that we are dealing now not with the act of Congress, but with a regulation under it.

221 The Court: That is a different thing. I will take that up when we come to it. I don't want to take up time in apparently suggesting that it is necessary for Congress to give any reason for any regulation.

Mr. Choate: My proof on this subject was offered only on the theory that it might be desirable or necessary for me to show that color was no worse than any other kind of impurity.

The Court: I don't think the morals of Congress are matter of inquiry.

Q. Doctor, you make a sharp distinction between mechanical methods and chemical methods, I believe? A. I make a distinction, yes.

222 Q. And do you follow any mechanical trade, doctor? A. Not as a profession, no.

Q. You don't have a great deal to do with mechanical analyses, then, I suppose? A. Oh, I make mechanical analyses in the laboratory occasionally, yes.

Q. As a chemist, or as something else? A. Being a chemist, I suppose I do it as a chemist.

Q. Is it a common thing to use mechanical methods and appliances in either making a complete analysis, complete for your purposes, or in preparing to make the analysis which is the object

of your search? A. Why yes, mechanical methods are used in the chemical laboratory constantly. 223

Q. Have you familiarized yourself with Leech on Food Analyses? A. Yes, I keep Leech at my elbow constantly, for reference.

Q. Is it one of the best books on the subject? A. It is an excellent book on the subject, yes.

Q. Does he have something to say about the chemical analysis of tea? A. Undoubtedly, yes.

Q. Does he refer to added color in tea, in connection with his chemical analysis of tea? A. He refers to the examination for color in connection with his examination of tea, yes; but he doesn't give any chemical analysis. 224

Q. What is the answer to my question, doctor? You have answered some other question. A. To the best of my recollection, he does not.

Q. Do you mean us to understand that when you mechanically separate a physical body into parts, preparatory to chemically analyzing either one or both or all of the separated results, that that process is not a chemical analysis? A. Which process?

Q. The entire process? A. It might or might not be; it depends. I cannot say on a general proposition of that kind, you will have to be more specific. 225

Q. Yes. Under what conditions, in addition to those I have stated, would it not be a chemical analysis? A. Well, the one that I have illustrated here in connection with the Read test, where some blue specks are separated from the tea, properly speaking, and then a chemical analysis made of the blue speck.

Q. Then you do mean us to understand that if you take a material body and separate it by a mechanical process into two parts, and then chemi-

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226 cally identify or treat one of those parts, that it is not a chemical analysis? A. No, I have not said that.

Q. Well, how does that process I have described differ from the analysis prescribed in regulation 22? A. If you should take, for instance, a sample of say some sand—

Q. No, I have asked you how a certain process differs from what is prescribed in regulation 22, doctor; I want you to keep on the point. A. Will you read the question to me please, the original question.

227 Q. (Question read by the stenographer as follows: "Then you do mean us to understand that if you take a material body and separate it by a mechanical process into two parts, and then chemically identify or treat one of those parts, that it is not a chemical analysis?") A. If you take a substance, yes, which is a substance *per se* and separate it preliminarily by a mechanical process, and then make a chemical analysis of even a portion of that, you would refer back your results to the original material, and might be said to make a chemical analysis of that material, yes; my illustration would have covered that.

228 Q. What I ask you is whether you say that it is chemical analysis? A. Well, yes, under certain circumstances.

Q. Yes. Now then, tell us in what respect the statement you have made differs from the principle in regulation 22? A. I have already tried to illustrate that by saying that you are not making an examination of the tea, you are making a chemical analysis of something which is foreign to that tea.

Q. Well, we start with the substance which the statute describes as merchandise described as tea.

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Now we separate it, do we not, by mechanical methods into two parts; do you agree with me so far? A. Yes. Well, yes. 229

Q. We chemically identify one of those parts?

A. Assuming that you chemically identify it.

Q. Well, the regulation says the chemist is to identify them, I believe. A. Yes, but because a chemist identifies them doesn't say he does it chemically.

Q. Well, pass that for the moment. Is it then a chemical analysis? A. Assuming your first proposition, that it is done mechanically——

Q. I am not changing my assumptions on you at all, doctor; is it then a chemical analysis? A. I will have to hear the first part of the question again. 230

Q. (Question read). A. No, I would not call it a chemical analysis of the tea.

Q. Neither would I, doctor. Is it a chemical analysis of the merchandise described as tea? A. It is a chemical analysis of some foreign matter in the tea, yes.

Q. I understood you to say, doctor, in answer to a question, that you had heard some witnesses at some time or other say that they could, by visual examination, identify Prussian blue; is that correct? A. I heard witnesses for the government, in the previous case, testify that they could identify these different colors; that is, determine whether a blue speck on a sheet of paper was Prussian blue or indigo or ultramarine, by mere inspection. 231

Q. Isn't it a fact that what you heard the witnesses say was, that if they knew it was one of this list of substances that you have mentioned, they could by microscopic examination tell which one? A. My recollection isn't as accurate as that; possibly they did make that proviso.

232 Q. There isn't anything improbable in a statement of that kind, is there? A. No.

233 The Court: Mr. Wemple, I have had the advantage this morning of having slept on the proof. It is a great advantage to sleep on a subject. I don't see but what this case is bound, sooner or later, to get down to one point, and I cannot help feeling that it has got there now, namely: your answer substantially sets up the proposition that by divers means including section 22 of the regulations, the tea inspectors are able to find out whether there be any coloring matter in tea offered for entry into the country. It doesn't make any difference whether the coloring matter colors or not. For all I can see, your proposition goes so far as to say that if a barrel was imported, if it comes in a barrel, and it gets a drop of indigo in it, it can be excluded. Anybody can see that. You say in your pleadings that that is chemical filth. The bald proposition is that any tea, whether it has been designedly colored, that is whether coloring matter has been put into it for the purpose and with the result of changing the color of the whole mass, 234 you say that if there is coloring matter in it that tea ought not to come in, and the government agents do not intend that it shall come in when you find that coloring matter is in it. It is not for any court to say that this or that particular portion of coloring matter is or is not sufficient to bar it; that is not a matter of argument. Now Mr. Choate says, the way you find out whether this coloring matter is there is not lawful.

Mr. Wemple: Precisely.

The Court: So you cannot keep it out on

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that ground. I don't know what he says on 235
the proposition that is really put up by your
pleadings, namely, that the government under
existing statutes has the right to keep out any
tea that has got what it considers to be chemi-
cal filth in it, to wit, we will say for example,
one two hundredth part of indigo. Isn't that
about all there is in it?

Mr. Wemple: I think so.

The Court: Of course, you will have a great
deal to say on the fact that there is no juris-
diction, but that is another situation.

Mr. Wemple: The only question that I can 236
see now, as your Honor states, is whether this
regulation 22, which is ultimately used on all
this tea, is a regulation in accordance with
the purview of the statute, namely, is it a
chemical analysis?

The Court: The question to my point of
view is this, whether it is not truly the conten-
tion of the Government that they have con-
tended, do contend and are going to continue
to contend, to keep out all tea that has any
coloring matter in it, no matter whether such
matter was put into it, so far as the observer
can discover, for the purpose of coloring it 237
or not, or whether it is mere carelessness or
accident.

Mr. Wemple: That is absolutely true, sir.

The Court: Very well.

Mr. Choate: If your Honor please, in para-
graph 8, folios 12 and 13 of my bill of com-
plaint, you will find the allegation that the de-
fendants threaten and intend to reject the said
teas if, by means of the said test or otherwise,
the said teas are found to contain matters
adapted for use as coloring or facing of any

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238 kind or in any quantity, irrespective of whether the same is or is not used or applied so as to conceal damage or inferiority, and so forth.

The Court: Mr. Wemple says that is all true.

Mr. Choate: I have not said that that was not unlawful, but that is my contention, and I do not have to allege my conclusion of law. My conclusion of law is that that is unlawful; that is my primary contention in this case.

239 The Court: Then you don't disagree, at least I don't observe that you disagree, with what I have tried to put forward as my analysis of the point in this case.

Mr. Choate: The two points, from my point of view, are I think, first just as you have stated, and we maintain that these defendants threaten to adopt, because they are directed to adopt by the Treasury Department, an illegal method of solving their problem, whatever it is, and secondly that under orders of the Treasury Department they threaten to throw out those if they contain any color, which we maintain is unlawful.

240 The Court: You claim it is an illegal ground?

Mr. Choate: Yes, that is all there is to it.

The Court: Well, then, we know where we are at now.

Mr. Choate: That is why I directed all my questions, in examining Dr. Deghuée, to asking whether this thing was a test to produce this, that or the other result, and by this, that or the other method.

By Mr. Wemple:

241

Q. You testified, as you stated, before the Board of General Appraisers, Dr. Deghuée? A. Yes.

Q. Have you changed your views since that time on this general subject? A. No, I have not.

Q. I ask if you remember testifying as follows:

Q. Suppose you recognize that as blue color in the Read test? A. If you recognize that blue color under the Read test as indigo, ultramarine, Prussian blue or any other specific blue color, that would introduce a chemical concept into the operation, and would in the broadest definition of the term bring it under the term chemical analysis." Do you remember so testifying? A. I said that. 242

Q. And that is your position to-day? A. Surely.

Q. Now you spoke of having counted yesterday, or you spoke of having counted at some time or other, six hundred particles of color, on a piece of paper I suppose? A. No.

Q. How did you count those six hundred particles of color in two ounces of tea, which you referred to? A. I first separated the color, by means of shaking it, pulverizing the tea and shaking it with carbon tetra chloride, and centrifuging it, and then took a portion of that sediment and examined it under the microscope, on the microscope slide, and counted the number of blue particles on the slide. 243

Q. How many particles did you count? A. I counted—why, it depended on the sample, of course. In one case there were only six on a slide; in another case there were as many as two hundred and twenty.

Q. Did this slide contain all of the residue that you obtained from the two ounces of tea? A. No, in making that examination I didn't use two ounces of tea; I used a smaller proportion, and then took out a proportion of that sediment. The rest was done by multiplication.

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244 Q. What kind of microscope did you use? A. You mean the name of the microscope?

Q. No, what is the general description of it? A. The usual form of compound microscope.

Q. Magnifying how many diameters? A. Approximately about 200.

Q. And the magnification used in the application of the Read test is seven and one half, is it not? A. No, it is not.

Q. How much is it? A. Usually about two and a half or three.

Q. Are you familiar with the regulation, Doctor? A. I am familiar with the regulation, and also with the method.

245

Q. You mean that you are familiar with the fact that the authorities that apply this test don't apply it according to the law or according to the regulation? A. I am quite sure—I have seen the lenses which they use, and they don't magnify seven and one half diameters. Moreover, the regulations say that a simple lens should be used, which magnifies seven and one half diameters, and a simple lens which magnifies seven and one half diameters is not purchasable.

Q. These are all your conclusions, I suppose? A. 246 Yes, they are conclusions drawn from investigation of the subject, yes.

Q. There isn't any impossibility about making a simple lens that will magnify seven and one half diameters, is there? A. Of course, it is very difficult to say a thing is impossible, but the focal distance of that lens would be quite small, and the size of the lens would be very small. As I stated, I have made inquiries among the manufacturers of lenses, and they all advise me that such lenses are not made.

Q. Now tell us, doctor, when it was that you

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were in the government tea room watching the examination of tea? A. I have never been in the government tea room watching the examination of tea. 247

Q. Then you are guessing when you say that the examiners of teas do not use what the regulation says? A. I am drawing a conclusion, yes.

Q. Yes. A. I am not guessing, exactly.

Q. You cannot state it as a fact? A. I cannot state it as an absolute fact.

Q. You don't undertake to? A. No.

Q. You spoke of analyzing some tea by shaking it in a certain solution, carbon tetra chloride is it? A. Carbon tetra chloride. 248

Q. And you took the matter that was thrown to the bottom of the test tube? A. Yes.

Q. You assumed that that was impurity, did you? A. I assumed it was not tea leaf.

Q. Well, did you assume that it was impurity? A. It depends. It was, in a general sense, impurity. It was largely foreign matter to tea.

Q. Yes. A. It was not all foreign to tea, properly speaking; that is, if you include in tea burnt tea leaf and decomposed tea leaf.

Q. Would this analysis, or this process, throw to the bottom exhausted tea leaves as well as other foreign matters? A. I doubt it; I cannot say positively because I have never tried it on exhausted tea leaves. 249

Q. And you are not able to say whether there was also impurities in the tea which you analyzed, which were soluble in carbon tetra chloride? A. There probably were.

Q. And your analysis took no account of them? A. No.

Q. In short, your analysis took no account of any impurity in tea which was either soluble in

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250 carbon tetra chloride or would float? A. No, it did not.

Q. And it did take account of all the substances, whether tea or not, which were thrown to the bottom? A. It took into account the substances which were not tea, after I got through with my process.

Q. Let me see. You said you did not take into account anything that was soluble? A. Yes.

Q. You did not take that into account at any stage of the analysis? A. I did not.

Q. You did not take into account at any stage of the analysis anything that floated in carbon tetra chloride? A. I did not.

251 Q. Now then, if those things, if there was in this substance anything not tea which did either of those two things, your analysis told nothing about it? A. It did not.

Q. If there was in the substance which you analyzed anything which was tea, but which would be thrown to the bottom of this medium, then you did take that into account? A. I did.

Q. So that the net result of your analysis, testified to yesterday, is that it separated a certain substance into that which sinks in carbon tetra chloride and that which does not sink, and had
252 nothing to say about whether they were tea or were not tea? A. Yes, it did.

Q. Well, explain to us how that was? A. I have already stated, I distinguished between the sediment which was possibly burnt tea or decomposed tea leaf, and the sediment which was plainly not tea, which was something foreign to tea.

Q. Well, how did you distinguish, how did you make this separation which you speak of now? A. Under the microscope partly, and partly by the use of chemical re-agents, making what might be called a chemical analysis of that sediment.

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Q. Yes; after you had shaken this substance in the medium that you used, were you able under the microscope to identify that which was tea from that which was not tea? A. I was able to identify a great deal that was possibly not tea. 253

Q. That is true. A. There may have been some specks there which were doubtful as to whether they were not tea, but were possibly decomposed or charred tea.

Q. Is decomposed or charred or exhausted tea something that you take into account in an examination or consideration of tea for purity? A. I certainly would, yes. 254

Q. But you were not able to take that into account in your analysis? A. Not in this particular process that I used.

Q. Well then, this particular process that you used is certainly not a rigorous means of determining purity from impurity? A. It was not any examination of tea for a general chemical analysis of tea, by no means, I did not attempt to do that.

Q. Well, was it a rigorous method of separating purity from impurity? A. It was not a complete method, no.

Q. Was it rigorous, doctor? A. So far as it went it was rigorous, yes. 255

Q. Your use of the microscope here was part of your chemical analysis, was it, doctor? A. No. The microscopic examination was not part of the chemical analysis.

Q. The use of the microscope was not a part of the chemical analysis, then? A. Not properly speaking, no.

Q. Well, was it or wasn't it, properly or otherwise? A. It was not. The microscopical examination was an examination by itself; it was for something entirely distinct from the chemical analysis.

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256 Q. So that every time in the course of a chemical analysis that you put anything under the microscope, you stop your chemical analysis and go to something else, do you? A. You may or may not. You can perform chemical analyses under the microscope of course.

Q. And what are they? What do you have to do under the microscope? A. I did in some instances where I was examining the government standards for instance, for the nature of the coloring matter, I made a micro-chemical analysis. I made the test for the coloring matter, the identification of the
257 coloring matter, under the microscope. There I was performing a chemical analysis under the microscope.

Q. What was your process there, doctor? What was your process there when you made a chemical analysis under the microscope? A. I applied some potash, caustic potash, to some of the material under the microscope and noted its effect on the blue speck. I also applied some hydrochloric acid to another portion of it.

Q. Did that change the use of the microscope into a chemical process? A. It was performing a chemical process under the microscope.
258

Q. Well, what I asked you was, whether that thing that you did changed the use of the microscope into a chemical process, within your definition? A. I don't quite understand what you mean by changing the use of the microscope. Of course, the mechanical use of the microscope is the same in all instances.

Q. Yes. A. But it was performing a chemical analysis on such a small scale that a microscope was necessary to watch the results of the chemical analysis, to watch the effect of the chemicals.

By the Court:

259

Q. Entirely irrespective of the inquiry whether the method set forth in regulation 22 is a mechanical analysis or a chemical analysis, will you kindly give me your opinion as to whether it is a useful and appropriate method of discovering the absence or presence of coloring or facing material in tea? A. I have worked with the Read test for a long time, ever since it has been published, and I have also used other devices for testing out the color, and my conclusion is that the Read test is a very unfair method of testing teas, for the reason that I have attempted——

260

Q. Pardon me; I didn't ask you about testing teas. I asked you whether that so-called test (I referred to the method or procedure) is or is not a suitable and appropriate method of discovering the presence or absence of coloring or facing material in tea? A. It is not, for the reason that it is unreliable. I didn't mean to quibble about words, your Honor. It is unreliable, for the reason that I have explained, that it all depends on the accidental question of the size of the particles, and it doesn't distinguish between a tea which has a mere trace of coloring matter and which may have more coloring matter, in every instance; it may or may not; it is a pure matter of chance.

261

Q. That, I take it, depends upon your view that the Read test only reveals particles which microscopically are large? A. That is the reason, and for the fact that those particles are not the particles which are adhering to the tea leaf, they are the loose particles; and moreover, because they are comparatively large and loose they are very unevenly distributed through the tea, so that one sample taken from the package—— That accounts

262 for the wide variation of the teas, that one sample taken from the package may show quite a number of these blue particles, whereas another sample taken from the same package may show a very few. And the regulation itself, in saying that the comparison should be made with a standard, appears to emphasize the point; for if the standard, if the tests were reliable and gave a certain number of specks of blue on a paper under certain conditions, within reasonable limits, then instead of comparing it with the standard each time it would be sufficient to say that if the tea container showed more than
263 a certain number of blue specks on the test paper, and that the standard never showed more than that number of specks, it would be accepted.

Q. I gathered, from what you say, that the so-called Read test was rather well fitted to discover the presence, of rather large, that is microscopically large, pieces of coloring matter, not in intimate union with the tea leaves, whether such union may be mechanical or chemical? A. It will, yes. It will detect large particles, but not in comparison with another tea. If the other tea were absolutely free from coloring matter, if it were a question of total presence or absence of coloring matter, then if
264 large particles were present the chances are the Read test would detect them.

Q. Now then, to begin again; it appears to be obvious that any such test as that which has been called the Read test would only show, could only show, that it was present in the particular two ounces or more which happened to be picked out. And having regard to what even a layman may know, concerning the nature of tea, its uses, in fact its texture, I don't see why, if there is no intimate mechanical or chemical union between coloring matter and tea, there will not always be under

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any conceivable kind of investigation, the possibility, even the probability, that one specimen will contain two or three or more loose pieces of coloring matter, and another specimen out of the same box will contain nothing at all? A. No, sir. 265

Q. Why must not it necessarily be so? A. That test does not take into account the fact that they color tea, if the tea is actually colored——

Q. No, but I am supposing that there is no intimate mechanical or chemical union between the coloring matter and the tea. A. Speaking merely of this accidental presence of the coloring matter?

Q. Yes. A. Why, yes, that is just the unreliability of the test, especially when you are comparing it with a standard; because if, as your Honor says, suppose a sample is taken of a particular two ounces taken out of a package and is put through the test and shows no coloring matter, that tea is passed. Another package of tea from another consignment that is taken, may actually have less coloring matter, and the particular two ounces taken from that will show particles, and that will condemn it, will exclude it. 266

Q. But I do not see why that difficulty is not inherent from the nature of the article to be examined, to-wit, tea, and from the nature of the object under suspicion, to-wit, minute particles of coloring matter present by carelessness or accident, and scattered through so loose and shifting a mass as dry tea leaves. It seems to me the difficulty is inherent in the nature of the subject. A. It is not inherent, your Honor, because I have actually separated, taken the standards for instance, and I have counted six hundred particles of coloring in what would be the equivalent of a two ounce sample. Now it so happened that I took the two standards and they checked up very closely, the estimate 267

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268 was both six hundred on the two samples. When
we are running into the hundreds of particles, then
a slight variation of ten or twenty or thirty would
not materially affect the result; but when, as in
the Read test, frequently the samples show only
two or three particles, there a variation of two or
three particles means either none or a great deal.
In other words, when we can detect the finely
divided color and count the particles and make
comparisons, the chances of error decrease and the
uniformity of the test becomes greater; the chances
that the two ounce samples will show approxi-
269 mately the same result are much greater, because
the fine powder is much more widely and much
more uniformly distributed.

Q. Well, it has always seemed to me, doctor, that
the judgment of anything by a sample is a method
of decision fraught with possibilities of unfairness.
Still, you cannot destroy an article in order to find
out whether it passes a test, and what you have got
here is an endeavor to ascertain the presence or ab-
sence of an article of one specific gravity, in an-
other and much larger article of an entirely differ-
ent specific gravity, and all perfectly dry and
capable of being shaken around. I don't see how
270 you can ever have any method of judging by sam-
ple that does not contain just as many elements of
uncertainty as the Read test of which you com-
plain.

REDIRECT-EXAMINATION BY MR. CHOATE:

Q. Doctor, his Honor has asked you these ques-
tions based upon the assumption that the color is
not in intimate union with the leaf. Now, if the
color is in intimate union with the leaf, is applied
to the leaf so as to change its appearance, then
what do you say as to the merits of the Read test?

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A. Then the Read test would fail entirely, for the color which remains on the tea leaf never gets on the sheet of paper, and would never show on the test sheet. 271

Q. As a matter of fact, what is it that the Read test tests, is it the tea or the dust? A. It is the dust, and the only particles of color which are detected are the loose particles of color which have not adhered to the tea leaf.

Q. So that all that is shown on the——

The Court: I think I grasp that idea thoroughly; those are the particles of color, microscopically large, of which the doctor has spoken. 272

Mr. Choate: Yes.

Q. And is it scientifically possible to infer, from the existence of such particles of color on the test sheet, that any color whatever adheres to the leaves?

A. No, it is not; in fact, I know as a fact that uncolored teas very often contain particles of color which have been blown in in the dust of the air of the room.

Q. Another matter, Doctor; in regard to the sieve used for the Read test, will particles of coloring matter which are not visible to the naked eye, if they adhere to the sieve, affect the result of the next tea tested in that sieve? A. Yes, they certainly would. 273

Q. Are you able to give us an idea of the size of particles which, if they are smeared on the paper under the Read test, make an appreciable amount?

A. I attempted to make some estimates on that. I would estimate it at about one-fiftieth of a millimetre. A millimetre is about one seven hundred and fiftieth part of an inch.

Q. Would that be visible to the naked eye? A. I

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274 made an error in my calculation there, it is less than that; it would be less than a thousandth part of an inch.

Q. Would that be visible to the naked eye, under ordinary conditions? A. If it were lying on a perfectly white sheet it would be; it would be visible under the lens used in looking for particles.

Q. Would it be visible to the naked eye in examining the sieve? A. It would not, certainly.

Q. So that the sieve might be full of such particles as that, from a preceding examination, and the examiner be none the wiser by looking at it? A. It might, yes.

275 Q. Did I understand you to say, in answer to Mr. Wemple, that your method of analyzing the government standards and the Q. U. I. 5, 6 and 7 teas, which you testified to, did not enable you to distinguish between the part of the sediment which was due to tea, and the part which was due to foreign matter? A. I didn't say that, no.

Q. The tubes which you have prepared and which are attached to Complainants' Exhibit 1, do correctly distinguish between the portion of the sediment which is composed of tea and the portion of sediment which is composed of foreign matter, do they not? A. It does, yes.

276 Q. What information had you on the subject of the magnifier used in performing the Read test by the examiners? A. When I first read the description of the Read test and wished to carry out the test, I made every effort, I inquired of all the dealers in optical instruments, whether they could supply me, asked them to supply me with a simple lens which magnified seven and one-half diameters.

Q. That you testified to, but I mean as to the lens which is actually used; how did you find out about that? A. Well, I have seen lenses which

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were stated to have been used, or the same 277
as were used by the tea examiners, and I have
measured the magnification of those lenses and
found them to be the usual, about the usual mag-
nification; that is, about $2\frac{1}{2}$ to 3 diameters.

Q. Have you examined lenses which were actually
furnished by the government for the performance
of the test? A. Not furnished to me, I couldn't
say that from personal knowledge; but said to have
been furnished by the government to tea importers.

RECROSS-EXAMINATION BY MR. WEMPLE:

Q. You spoke about applying some indigo and 278
Prussian blue to some tea, did you, Doctor? A.
Yes.

Q. How did you apply it? A. In various ways;
chiefly by sprinkling in powdered color, on a quan-
tity of tea in a rotating drum, and then rotating
that drum for an hour and a half.

Q. Did you use any other method? A. I also
tried spreading a soluble color on the tea.

Q. A soluble color? A. A soluble color, yes, sir.
I used a sulfinated indigo, which is soluble in water,
and I spread that on the tea by means of an ato-
mizer, and then rotated it. 279

Q. Did you apply the Read test to these two
methods? A. I did, to all of them. I made a num-
ber of experiments, and I applied the Read test to
all of them.

Q. Did you recover the color?

Mr. Choate: Recover?

The Witness: I recovered varying amounts
of it, yes.

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280 Q. You found color, at any rate? A. In all of them except the one where I had used a soluble color, spread it on.

The Court: Do you mean you recovered it by the Read test?

The Witness: I detected the presence of color by the Read test.

Q. How did you treat the tea that you applied the soluble color to before operating the Read test? A. How did I treat it?

281 Q. Yes. A. I simply carried out the prescription for the Read test, the prescribed method, without treating the tea at all. I treated that tea just as I did the others.

Q. Did you get two ounces out of the tea, or did you get the dust from two ounces of tea? A. I did.

Q. And did you get the prescribed weight of dust? A. I did.

Q. Did you rub the tea at all against the sieve? A. Possibly, yes.

Q. Well, possibly or probably or certainly? A. I don't recall specifically whether I did.

Q. What is that? A. I don't recall specifically. I rubbed it around with my hand probably.

282 Q. But you didn't get any results from the application of the Read test to that? A. No.

Q. I suppose it is clear to you that from the time tea has made a journey from China here in a package it has been rubbed around considerably and shaken? A. Undoubtedly, yes.

Q. And that would tend to dislodge the particles of color that were clinging to the tea leaves, or certain particles of color, at any rate?

Mr. Choate: If your Honor please, I should like to except to that.

The Court: I think you are going too far afield.

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Mr. Choate: I rather like that line of argument, but I don't think it is pertinent. There wouldn't be such a thing as colored tea, then. 283

Mr. Wemple: That is all right.

The Court: Then I think you admitted that you have agreed that it really doesn't make any difference whether some malicious cooley came along and threw a bit of indigo into a man's tea?

Mr. Wemple: I think that is the lawful position, sir.

The Court: If you perform your Read test, and find spots on these papers and throw out the tea, that is all there is to it. 284

Mr. Wemple: That is all.

Q. Did you spray any Prussian blue on, in a water suspension? A. I didn't attempt to.

CHARLES FREDERICK CHANDLER, called as a witness on behalf of the complainants, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. CHOATE:

Q. Dr. Chandler, will you state your occupation and what position you now hold? 285

The Court: You admit Dr. Chandler's qualifications?

Mr. Wemple: Oh, yes, sir.

Mr. Choate: As a leader of his profession, I take it?

Mr. Wemple: As far as you like.

Q. Dr. Chandler, you have been a chemist for how many years? A. I began to study chemistry in 1851. I forget how many years that makes.

Q. Have you given particular attention to the chemistry of food products? A. I have, all my life.

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286 Q. Are you familiar with the method of examining teas prescribed by Regulation 22 of Treasury Decision 33211, which I now show you (handing witness paper)? A. I am.

Q. Will you state whether, in your opinion, that method constitutes a test of the purity, quality or fitness for consumption of teas examined thereby, in comparison with Government standard teas, also examined thereby? A. It does not.

Q. Will you state your reasons for your answer?
A. Because it is limited to the detection of loose particles of two or three coloring matters which
287 might be possibly present. It is not even a satisfactory test for the presence of coloring matter, because if the coloring matter is so applied in solution, there will be no solid particles. It is only when the coloring matter is applied to the tea in the form of distinct particles, having an actual size, detached from the leaf and associated with the dust that it can be detected at all. There would be no difficulty whatever in coloring tea so that it will pass the Read test, by simply applying a soluble coloring matter in solution to the leaves. It doesn't even detect all the particles of distinct coloring matter, because they may be contained in
288 the rolls, rolled up in the tea. It only detects such particles of coloring matter, blue, which are loose, entirely loose and detached from the tea and are in the dust. It is really an analysis, mechanical analysis of the dust of the tea.

Q. Is it capable of giving any information as to whether the tea in question is purer or less pure than the standard? A. It does not. It doesn't even show that the article examined is tea at all; it might be made up of leaves of other plants, and not tea leaves, or exhausted tea leaves.

Q. Does it tell anything whatever as to the pres-

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ence or absence of dirt in either the standard or 289
the sample offered for import? A. It does not.

The Court: Well, unless you assume that coloring matter is dirt——

Mr. Choate: Well, for the moment I am expecting coloring matter from the class of dirt.

The Court: Very well.

Q. So that, if tested by this method prescribed by Regulation 22, two ounces of the standard might contain 100 grains of dirt and imperceptible color, while two ounces of the sample offered for import might contain one one-hundredth of a grain of color and no dirt, and the test would condemn the sample offered for import and pass the standard; is that right? A. It would. 290

Q. Although in that case the standard would be 100 times more impure than the sample offered for import, is that right? A. It would.

Q. Now, Doctor, does the regulation 22 prescribe a test of the comparative purity or fitness for consumption of the tea, as compared with the standard, by chemical analysis? A. It does not.

Q. Will you explain your reasons for that answer? A. You refer, I suppose, to the Read test, do you? 291

Q. I refer to the test provided by the whole of regulation 22, which is the original Read test with modifications? A. I think the question was whether——

Q. Whether it prescribes, that it requires, demands, a test by chemical analysis of the purity or fitness for consumption of tea? A. It does not.

Q. Now will you explain why, or rather why not? A. It simply calls for a sifting out from two ounces of tea of the dust, through a sieve of a certain number of holes to the inch, and the examination

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292 of this with a lens, after rubbing it on a piece of white paper. There is nothing chemical about that.

Q. After that is carried out, Doctor, the regulation prescribes that the sheet, that is the sheet containing the specks or not containing them, should then be sent to the local appraiser's chemist, or to the nearest pure food laboratory of the Department of Agriculture, for identification of the coloring or facing matter disclosed. As soon as the coloring or facing matter is identified, then the tea should be rejected. Does that clause make the process a chemical analysis? A. I should say not.

293 Q. Why not? A. An analysis is taking things to pieces and examining the constituents. Now, a simple chemical test here is made, not of the tea but of the blue microscopic specks on a piece of white paper.

Q. Well, does this regulation require the making even of a chemical test of the specks? It says, "the test sheet of the tea in question shall then be sent to the local appraiser's chemist for identification." Does that require necessarily a chemical test? The speck is sent to the chemist for identification; does that require a chemical test? A. Not necessarily; the chemist may simply look at the speck and say
294 he thinks it is Prussian Blue.

Q. Now, Doctor Chandler, I think you have said that the method of examination prescribed by Regulation 22 is a mechanical analysis. Can you give us any other examples of mechanical analysis, as the phrase is understood in your profession? A. Yes, I remember a case in which the question of whether the mortar used in constructing a block of tenement houses was made in accordance with the building law, which called for the use of clean, sharp sand; and it was shown by sifting the sand employed in building these houses through sieves

of different sizes, that it was not clean, sharp sand. 295
That was a mechanical analysis. Percentages were given of the quantity that passed through 150 mesh sieve, the quantity that passed through 100 mesh sieve, but failed to go through the 150 mesh, and so on. The sand was divided into a dozen different portions by the use of sieves. That was a mechanical analysis of the sand.

Q. Does the method prescribed by Regulation 22 call for any chemical operation whatever? A. It does not.

Q. Does it require the real or even the imaginary separation of any chemical elements or chemical compounds from a chemical union? A. It does not. 296

Q. Does it require the use of any chemical reagents? A. Well, that depends of course upon what the chemist would do, to which the paper might be sent. He might apply chemical tests, if he saw fit.

Q. He might or might not, as he chose? A. Or he might not.

By the Court:

Q. Having regard to the literal fact, that a substantial blue mark is said to be there from indigo or Prussian Blue, assuming the paper containing the blue mark was submitted to a chemist of prominence, what would you say as to a reasonable, simple, accurate method of finding out on the part of the chemist what that blue mark was? A. I should apply caustic soda to it, and if the blue color disappeared I should say it was Prussian Blue; particularly if it left a reddish brown speck or oxide of iron, hydrate of oxide of iron, in place of the Prussian Blue. If it failed to do that I should say it was not Prussian Blue, and I would 297

298 apply hydrochloric acid to see whether the color disappeared. That would be ultramarine, if it did. If it did not disappear, and it was not ultramarine, I might then apply a solution of chlorine and see if the blue color disappeared, which would be the case if it was indigo. I might make a chemical analysis of the blue spot.

Q. But the application of these several substances which you have enumerated to the piece of paper—— A. (Interrupting) They are chemical tests.

299 Q. You would not describe that as a chemical analysis, would you? A. No, it is a chemical test.

Q. It is a chemical test? A. Yes.

By Mr. Choate:

Q. Are there other colors, other than Prussian Blue, ultramarine and indigo, which are adapted to use as coloring matters in tea? A. Oh, yes, any quantity of coal tar dyes might be used. They might be used in solution, and then they would not respond to the Read test at all.

Q. Are any of them harmful? A. Any of them what?

300 Q. Harmful? A. Not many of them.

Q. Well, are some of them? A. There are some of them which in sufficient quantity might be harmful.

Q. As to Prussian blue, indigo or ultramarine, are any of them harmful? A. None of them harmful.

Q. Why? A. Because they are non-poisonous.

Q. What have you to say about their effects in the quantities which are used in teas, that is, in quantities from one part to fifty thousand down? A. There is nothing that would be poisonous under

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those circumstances. The quantity is so small that 301
if it were arsenic it would not do any harm.

CROSS-EXAMINATION BY MR. WEMPLE:

Q. Do you know whether, Doctor, as a matter of fact, teas are colored in China or other producing countries, with matter in solution? A. No, I don't know what they use in fixing the teas in foreign countries.

Q. Then you are not able to say whether this test may or may not be a perfectly feasible test for such teas as we have? A. I can't say that. It would be extremely easy for them to use the other 302
colors. We have educated a good many Chinese chemists, and they have gone back to China; I have had several myself.

Q. You spoke a while ago of a certain tea in comparison with another tea that was put to you, as being one hundred times more impure. Do you include artificial coloring matter as an impurity in your definition and understanding? A. It is very difficult to decide exactly what is a proper definition of impurity in an article of food. Anything which is not a natural integral part of the food might be said to be an impurity, although it would be perfectly harmless. On the other hand, something which might go into it without any action on the part of the person who prepared it, might be extremely poisonous. It would not be an added impurity, it would be an impurity which found its way there, like ptomaine poisons, for instance, in an article of food. It is not an added impurity. The word "impurity" has not an absolutely definite meaning. "Impure" carries the idea of something which is offensive, something which is impure and offensive; and if a substance is not impure in that 303

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304 sense, it would hardly be proper to call it impurity.

Q. Then a reasonable amount of chalk in tea you would not think was an impurity? A. Not such a quantity as they put in, would amount to anything, the amount put in. I never knew them to put chalk in.

Q. I don't know that they do; I want to know what you would say about it if you found it there, as to whether it is an impurity or not? A. If you start out with the intention of calling everything which is foreign to a natural product impurity, then
305 chalk would be an impurity.

Q. No, I am asking you, Doctor; I am not defining it for you, I want you to define it for me? A. If you will present a concrete case I will tell you what I think of it.

Q. Suppose you had a certain amount of clay in tea, would that be an impurity, in your understanding? A. It is a foreign substance, a harmless foreign substance. I don't think I would call that an impurity.

Q. You would not call that an impurity? A. No. Water in milk is one of the most common things I am familiar with. That is an adulteration,
306 watered milk. You might say that the milk was not pure, because it had water added to it, although the water is perfectly harmless. It is a case of fraud.

The Court: And normally constitutes pretty nearly the whole of milk as it comes out of the cow, doesn't it?

The Witness: Certainly; normally milk contains about 88 per cent. of water.

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Q. Still, it is better to have that water come from the cow first, isn't it, Doctor? 307

The Court: It is just the same water.

The Witness: Water is not as expensive as milk, and consequently it is a fraud to serve water instead of milk.

Q. Doctor, you said a moment ago that regulation 22 did not necessarily prescribe any chemical process whatever, and you stated the reason as being that the chemist might look at the sheet and say he thought it was Prussian blue; is that in your opinion an identification of the blue marks that you see on the paper sheet? A. It might be. 308

Q. In your opinion it might be? A. Yes. There is a difference in the appearance of ultramarine and Prussian blue, when carefully examined.

Q. If it were an identification of those substances as chemicals, would the process involve any chemical concept? A. No.

Q. It would not? A. No. Any person not a chemist, who is in the habit of seeing ultramarine and seeing Prussian blue, would distinguish the difference between them by their appearance. He might not be a chemist at all and might not know the chemical composition. 309

Q. And merely to distinguish Prussian blue from ultramarine is not a chemical idea, in your mind?

A. No, a laundress might distinguish them.

Q. She might have a chemical idea? A. No laundress would have a chemical idea.

Q. Supposing, Doctor, as you stated you would do, these streakings on the paper were identified as substances having understood chemical formulas, would that involve a chemical concept? A. Yes, it involves a chemical test.

Q. It involves a chemical test; well, is there a

310 difference between a chemical test and a chemical analysis? A. Yes, an analysis is a much more elaborate affair than a mere test.

Q. Well, where does the test stop and the analysis begin? A. Well, there is no sharp distinction, any more than there is between veal and beef.

Q. Then, is there any qualitative chemical operation which is an analysis as distinguished from a test? A. Oh, yes, we often take a thing into twenty pieces, in order to make a qualitative analysis.

311 Q. Here is a substance described as tea, which is made up of several things, and we take that into two parts at least, one of which turns out to be blue streaks on paper and the other turns out to be all the rest. That is a separation that is comparable with the process you suggest, is it not? A. No, that is a mechanical separation; there is nothing chemical about that.

312 Q. Is there anything to hinder your making a mechanical separation of a substance which you wish to qualitatively test? A. Why yes. If I have a solution given to me, as I have often given it to my students, I say, "I want you to find out what is in this substance." The man takes the solution and he adds some hydrochloric acid to it, and if there is any silver there or any lead there, or any sub-salt of mercury there he immediately gets a white precipitate. He filters that out and sets it aside for further examination. He then adds sulphuretted hydrogen to the filtrate, and he may get a precipitate containing seven or eight other metals. He filters that out, and keeps that for further examination. Then he adds ammonia and sulphide of ammonium to the filtrate. He gets another precipitate that may contain five or six different metals. He leaves that out, and keeps it for further investigation. Then he screens the

filtrate still further. Then he adds carbonate of ammonia to the filtrate, and he gets a white precipitate which may contain three or four different elements. He sets that aside and treats that separately. Now the first white precipitate that he obtained with hydrochloric acid, he would boil some of it with water and filter it, and he would test the filtrate and he might find the lead in it by means of sulphuric acid. He would then apply ammonia to another portion of it, and if it turned black it would show that suboxide of mercury was produced, and he would filter it and test the filtrate with nitric acid, and he would get a white precipitate, chloride of silver. So you see the process of analysis would probably take a day or a day and a half, and would probably involve a hundred different chemical reactions. 313 314

Q. The purpose of all of that was to find out what chemicals were in the solution, or what elements? A. The purpose of that was to ascertain by chemical means the composition of that solution.

Q. Do you insist that your students shall use only chemical means? A. Yes, because it becomes mechanical if you don't use chemical means.

Q. How about the use of the filter, is that a chemical process? A. No, that is a mechanical process. 315

Q. You allow them to use it, though? A. Oh, yes, but it is not a chemical part of the work. Taking up a thing with my fingers, I have to do it fifty times perhaps in making an analysis, but that is not the chemical part of it.

Q. It is all part of the integral analysis, isn't it, Doctor? A. Why, looking at it is part of it, but that is not part of the chemical process.

Q. Isn't it part of the process from the time

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316 you take a solution and divide it into the parts you want it divided into, as much as the analysis? A. Yes, the process is analysis, but it becomes chemical analysis and is chemical analysis only so far as chemical re-agents and chemical reactions are involved.

Q. Then in making a qualitative analysis of a solution, you have anywhere from 12 to 500 chemical analyses in it, have you? A. No, not chemical; the whole thing is a chemical analysis.

317 Q. That is what I was trying to find out. The whole process of separating this solution into the things that you desire to separate it into ultimately is chemical analysis? A. Yes, that is the way I designate it, but if I simply separated oil from water by letting the oil rise to the top, I would not call that chemical analysis.

Q. We are speaking, Doctor, only of the example you gave us a while ago. We are not going outside of your case at all. I ask you again if the entire process, from the time you hand out the solution until your pupils bring you the result, is chemical analysis or is not? A. A chemical analysis is involved.

318 Q. Wait a minute, Doctor. I am going to ask you to answer that question yes or no? A. If you mean by your question that every act involved in that transaction is a part of a chemical analysis, then I say no.

Q. Now, Doctor, I have given you—— A. (Interrupting) I have to step across the room several times in making these tests, but that is not a chemical analysis. The portion of it which is chemical is that portion which involves the use of chemicals to accomplish results. Handling these things, taking a sapatula to put something into a liquid, that

is not chemical, although I may have to do it in making the chemical analysis. 319

Q. Now, Doctor, I haven't given you any definitions. I have asked you to give me a yes or no answer to this question. You said you gave a solution to your pupils and asked them to make a qualitative chemical analysis of it, and I ask you if the entire operation from the time you give it to them until you get back the results does in your opinion constitute chemical analysis? A. If you mean by that question——

Q. Now, wait a minute, Doctor. I don't mean anything, I am asking you to tell me whether it is a chemical analysis, in your opinion? A. If you don't tell me what you mean, I don't know how to answer it. 320

Q. Let me put another case, Doctor. Supposing that a dry substance is handed to you, and you are desired to ascertain and report whether that dry substance contains Prussian blue, and let us assume that in doing that you separate the dry substance into two parts, one some specks on a piece of paper, and the other part all of the residue; that you take these specks on a piece of paper and apply to them certain chemical reagents that are known to you as likely to answer the question you are trying to answer, and you get the reaction from the application of those reagents which indicates that the substances found are in fact Prussian blue; is that process or is it not within your definition of qualitative analysis? A. It is so little of a chemical analysis that we call it a chemical test. 321

Q. All right; it would be a chemical analysis except for the fact that the process is so short and simple? A. A great many of those, collected together, will constitute an analysis; but the mere

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322 testing for one minute constituent is hardly a chemical analysis.

Q. Suppose the majority of this substance that I gave you was made up of Prussian blue, and the smaller portion was something else, would that change its character in your opinion, from a chemical test into a chemical analysis? A. No, it would not.

Q. Supposing, Doctor, that I handed you a blue lead pencil and asked you to tell me what the blue marking portion was made of, would your ascertainment of that proposition be a chemical test or a chemical analysis? A. It would be a chemical test, unless you asked me for all the constituents. If you asked me simply to say what blue it was, if it was a blue pencil, and I made a single test, a speck of the blue, with a drop of liquid, which is all that is necessary for a test of Prussian blue, I would call that a test, not an analysis.

323

REDIRECT-EXAMINATION BY MR. CHOATE:

Q. Doctor, as I understand you, your distinction is this, that an analysis tells you what is in the substance which is being examined, and a test merely tells you that a particular substance is in it? A. That is it, exactly.

324

Q. Now, Doctor, you were asked, whether if a particular substance was handed you with the request that you look for Prussian blue, you would make a test in a particular manner. What would you do if a substance were handed you with a request that you perform a chemical analysis to determine the purity of that substance? A. Of course, it would depend on the substance. I might have to make a great many different tests.

Q. I don't mean the nature of the tests, but what would you endeavor to report, on that simple re-

quest? A. The substantial constituents of the substance. 325

Q. Everything that was in it? A. Everything of any importance that was in it.

Q. I forgot to ask you on your direct examination, whether the method prescribed by Regulation 22 was capable of giving any quantitative results whatever? A. It is not; it is an imperfect qualitative test, and an absolutely imperfect quantitative test.

Q. I also forgot to ask you whether substances which are used as facings in tea, that is gypsum and talcum and perhaps plumbago are harmful in any such quantities as appear in teas? A. They are not. 326

Q. For the same reasons as the coloring? A. Because they are absolutely harmless.

RECROSS-EXAMINATION BY MR. WEMPLE:

Q. Doctor, regarding the quantitative character of the test provided by regulation 22, have you ever applied the test in practice? A. I have seen it applied; I never had occasion to use it on my own account, but I have seen several repetitions of the test by a regular tea tester.

Q. Was your answer to that question given on your opinion as a scientific man, or from any practical experience that you had? A. I don't quite understand, what question? 327

Q. Regarding the quantitative force of the Read test? A. It was given from my knowledge as a chemist, of life-long experience.

Q. It is on your opinion, of your knowledge as a scientific man? A. Well, on my knowledge of the nature of the things involved in this test.

Q. Yes; you don't mean us to understand that if you applied the Read test to two different samples of tea, and found a large discrepancy between the number of loose specks secured from one and from

328 the other, that that would not furnish any basis of inference regarding the relative quantities, do you? A. A very imperfect basis, because one sample of tea might have the blue color applied in such a way that there were no solid particles of coloring matter to appear at all, or only a few, while the other sample of tea, the standard, perhaps, might have the coloring matter applied in such a way that nearly, if not all of it, would come out in the dust.

329 Q. Then if the two teas, if the two samples of tea had been prepared in the same manner, there would be some basis of inference as to the relative quantities found in the one and in the other? A. If it were possible to have the two samples of tea prepared in exactly the same manner, and the coloring matter applied in exactly the same degree of fineness, exactly the same quantity of moisture present in the leaves, and all other conditions alike, which would be pretty difficult, you might draw some conclusion.

RE-REDIRECT-EXAMINATION BY MR. CHOATE:

330 Q. Doctor, I also neglected to ask you if you recall an experiment that you and I performed with some government standard teas and a blue pencil; will you describe that experiment to his Honor? A. This was an experiment in which we took two ounces of tea out of one of the government standards, I think it was, and I took out my blue pencil, and with my penknife I scraped off the least quantity of this blue material that I could and get anything. That was put into the two ounces, and thoroughly sifted, and then when it came through it was tested by the Read test and made a very astonishing demonstration of blue on the paper.

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Q. Have you got the test sheet with you? A. 331
(Witness produces paper).

Mr. Choate: I offer that in evidence.

Marked Complainants' Exhibit No. 6.

The Court: What is the material which you took from the blue pencil?

The Witness: It is supposed to be Prussian blue.

RE-RE-CROSS-EXAMINATION BY MR. WEMPLE:

Q. Did you say, Doctor, how you applied this blue pencil to the tea that you took? A. My recol- 332
lection is that we put it into the two ounces, mixed it thoroughly together, and then sifted it.

Q. You did not apply it with heat? A. Why, yes, applied it to the tea.

Q. With heat, I mean; was there heat present under the tea when you applied it? A. No, there was not.

Q. Then how did you divide it, how finely did you divide it, do you know? A. As finely as I could scrape it off my pencil. The object was to get as little as possible, in as fine a condition as possible.

Q. With a knife blade? A. With a sharp knife 333
blade, scratched it off.

Q. It is rather a rough method of coloring tea, isn't it, Doctor? A. I beg pardon.

Q. It is rather a rough method of coloring tea, perhaps? A. I think as good as any, to correspond with the Read test.

By Mr. Choate:

Q. The object of the experiment was, Doctor, was it not, to show what extraordinary effects might

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- 334 be produced by accidental introduction of color?
A. Yes, that is it.

Mr. Choate: As I understand, Mr. Wemple, you are prepared to admit the allegations of paragraph 16 of my bill of complaint, to the effect that if the defendants be permitted to examine the said teas by the said illegal method, the damage which may result to the complainants under the several matters hereinbefore alleged will exceed the sum of \$3,000?

Mr. Wemple: As far as being a fact is concerned, I admit it; I do not admit its relevancy.

- 335 Mr. Choate: I think that is all. The complainants rest.

HOWARD S. PAIN, called as a witness in behalf of the Respondents, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. WEMPLE:

Q. What is your business, Doctor? A. I am a chemist employed by the Bureau of Chemistry.

Q. In Washington? A. In Washington.

- Q. How long have you been there? A. Five
336 years.

Q. And what was your experience and education before you went there? A. I graduated from Harvard University, with the degree of B. S., and a year's post graduate work in the University of Missouri, and two years post graduate work in George Washington University.

Q. And since you have been in the Bureau of Chemistry, what have your duties been? A. Well, they have been of a somewhat varied nature. As a general proposition, concerned with the analysis of food products of different kinds.

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Q. Your education has been that of a chemist? 337
A. Yes, sir.

Q. Now I ask you if you examined certain samples of tea marked Q. U. I. 5, 6 and 7? A. I have.

Q. And in what connection did you make that examination? A. I received those samples sent from the Treasury Department.

Q. Did you examine certain other samples of tea at the same time? A. I did.

Q. Standards? A. Yes, sir.

Q. Known as standards? A. Yes, sir.

Q. And what are the descriptions of the teas that you used as standards? A. Those were marked Young Hyson Government standard, and gunpowder, Government standard. 338

Q. Did you examine the Q. U. I. teas, each number, in comparison with both of these standards that you mentioned? A. I did.

Q. And for what purpose? A. For the purpose of comparing the amount of Prussian blue in the different samples.

Q. State the process that you used in making this analysis? A. The purpose was to separate the Prussian blue from the tea. To do that I used amyl alcohol to extract it. 339

Q. Amyl? A. Amyl alcohol, with saturated hydrochloric acid gas. Prussian blue is soluble in this mixture, and other substances also.

Q. And other substances, too? A. Some other substances also.

Q. Yes. A. This solution then was filtered through the extracted tea leaves, and the amyl alcohol and hydrochloric acid were evaporated off, and that left the Prussian blue, plus the other substances which were extracted with the amyl alcohol. This was then treated with acetic ether, and

340 the acetic ether dissolved the foreign substance and left the Prussian blue.

Q. You mean the acetic ether will not attack the Prussian blue, or dissolve it? A. It does not dissolve the Prussian blue. This residue was then put in a flask, and sulphuric acid added to it, and a little cupreous chloride, afterwards.

Q. Go ahead. A. This was then distilled and then hydrocyanic acid was generated from the Prussian blue, distilled over and received in a caustic potash solution. From this Prussian blue was then reformed, and determined quantitatively.

341 Q. Did you treat the government's standards in just the same way? A. I did.

Q. Now state the results which you obtained in this manner? A. In the tea that I received from the Treasury Department, marked Q. U. I. 5, I found nineteen parts of Prussian blue per million; in the one marked Q. U. I. 6, I obtained twelve parts of Prussian blue per million, and the one marked No. 7 I obtained ten parts of Prussian blue per million. I could detect no Prussian blue in the government's standards.

Q. None whatever? A. None whatever.

342 CROSS-EXAMINATION BY MR. CHOATE:

Q. How much tea did you use in performing this analysis? A. About 100 grams.

Q. 100 grams; is the method which you have adopted published in any of the government's publications? A. It is not.

Q. It is your own invention? A. It is.

Q. And entirely original with you? A. Yes, sir.

Q. Now, you used 100 grams of tea? A. Yes, sir.

Q. And you got nineteen parts per million of the Q. U. I. 5? A. Yes.

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Q. How much is that in weight? A. It would be 1.9 milligrams of Prussian blue. 343

Q. 1.9 milligrams? A. Yes, sir.

The Court: To how much tea?

The Witness: In one hundred grams of tea.

Q. In one hundred grams of tea; isn't a milligram one-hundred-thousandth part of a hundred grams? A. It is.

Q. So that what you got in the Q. U. I. 7 was one milligram of color out of one hundred grams of tea? A. In which one?

Q. In the Q. U. I. 7? A. Yes, that is right.

Q. How did you weigh or measure that amount? A. I didn't weigh it; I estimated it by color comparison. 344

Q. By a color comparison? A. Yes.

Q. Describe your method of weighing that? A. I took potassium cyanide, a known amount of potassium cyanide, which was very accurately determined, and from that produced Prussian blue. In this method, when hydrocyanic acid is distilled over and is collected in the caustic potash it produces potassium cyanide. For my comparison I took a known amount of potassium cyanide and treated that under exactly the same conditions as I treated what was turned over. By that method it can be ascertained with an error of not more than five per cent., plus or minus. 345

Q. Did you examine the resulting Prussian blue which you obtained by that method under the microscope? A. No.

Q. So that you don't know in what form it appeared in the tea? A. No.

Q. You made no examination of the government standard under the microscope, to determine whether it contained any color? A. I didn't use the microscope at all.

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346 Q. Did you examine the government standard with reference to whether or not it contained any other color than Prussian blue? A. I did not.

Q. So it may have contained quantities of ultramarine, and your examination would not disclose that fact? A. It might possibly; I only examined for Prussian blue.

Q. You made no examination for any other variety of foreign substance in the tea than Prussian blue? A. No, I did not.

347 Q. So that either tea may have contained any quantity of filth, organic matter, microbes, dung, if you like, and your examination would not have disclosed it? A. Yes, it might possibly.

FRANK K. CAMERON, called as a witness in behalf of the Respondents, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. WEMPLE:

Q. Doctor, will you state what your profession is? A. Chemist.

348 Q. And where are you working at the present time? A. I have charge of the physical and chemical investigation and fertilizer investigation of the Department of Agriculture, Bureau of Soils.

Q. In Washington? A. In Washington.

Q. How long have you been there? A. About sixteen years.

Q. And where were you educated? A. I took both my bachelor's degree and doctor's degree at Johns Hopkins University; the bachelor's degree in 1891 and the doctor's degree in 1894.

Q. After that? A. Sage fellow, an honorary fellowship in chemistry at Cornell University. Then I was two years associate professor in the Catholic University, Washington, D. C., and was research

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assistant in physical chemistry at Cornell University, after which I entered the government service as an expert and a year later was put in charge of the laboratory over which I still preside. 349

Q. Have you all these years pursued your profession as a chemist? A. I have.

Q. And followed the writings of authorities on the subject? A. I have.

Q. Have you read regulation 22, or article 22 of the tea regulations of 1913? A. I have.

Q. Does the design or method there described, in your opinion, constitute a chemical analysis? A. It does.

Mr. Choate: One moment. If your Honor please, I object to that, because the question here is not whether this constitutes a chemical analysis; as I have already called to your Honor's attention, a chemical analysis might be prescribed for the tin container, or the carpet on the floor, or anything else having no reference to the tea. What the act calls for, and what alone can satisfy the statute, is the test of the comparative purity, quality and fitness for consumption of the tea in comparison with the standards, by chemical analysis. So that it is perfectly immaterial 350
351 whether this be a chemical analysis, or not, unless it is to test by chemical analysis the particular things prescribed by the statute.

The Court: Objection overruled.

Mr. Choate: Your Honor will grant me an exception?

The Court: Yes.

Q. Answer, Doctor. A. It is a chemical analysis, in my judgment.

Q. Do you agree or disagree with Dr. Chandler, in drawing a distinction between chemical tests

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352 and chemical analyses? A. It seems to me it is a distinction without a difference; the two terms can be used interchangeably.

Q. In your opinion the two terms can be used interchangeably? A. Yes.

Q. Have you had occasion, or have you at all observed the operations of this article 22 of the tea regulations? A. You mean have I actually and personally carried out a Read test?

Q. Yes. A. I have not.

Q. Have you observed others doing it? A. I have.

353 Q. What, in your opinion, is the merit or demerit of this regulation as a means of discovering in a substance known as tea, the presence or absence of certain chemicals?

Mr. Choate: Although your Honor asked a similar question, I feel I ought to object to that on the ground that it is immaterial and irrelevant.

The Court: I think it probably is, but I will overrule the objection on the ground that I asked the question.

Mr. Choate: In the same way your Honor will grant me an exception?

354 The Court: Yes.

The Witness: It seems to me the method is well adapted to show the presence of some substances that are not tea in the mixture.

Q. What is your opinion of this method described in Article 22, as furnishing or failing to furnish any inference for quantitative judgment in comparing the results obtained from two different lots of merchandise? A. It is only roughly quantitative. You couldn't make any precise comparisons, but you could certainly say that one

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sample contains more coloring matter than another one does. 355

CROSS-EXAMINATION BY MR. CHOATE:

Q. You say that you can certainly say by the use of the regulation 22 test that one sample contains more color than the other? A. I should say so, yes.

Q. That is, if one tea contains more color than another, the Read test as prescribed by regulation 22 will infallibly carry it out? A. If you will allow me to qualify my statement.

Q. Go ahead and do so. A. If one of them contains only a fraction of a per cent more than the other, I doubt very much whether you could distinguish it; but if one contains much more than the other you could. 356

Q. You say you have repeatedly seen the Read test carried out? A. No, sir, I didn't say that; I said I have seen it.

Q. How often have you seen it? A. Probably four or five times.

Q. You have never done it yourself? A. No, sir.

Q. But have seen it done four or five times? A. Yes, sir. 357

By the Court:

Q. Do you agree, if you think anything about it at all, that if the coloring matter placed upon the tea is in intimate union with it, which I take it to mean actually sticking to the leaves of the tea, that the Read test will not reveal that kind of coloring matter at all? A. I think it will reveal it.

Q. Have you ever seen it tried? A. Not in this

358 particular case, but I have seen similar cases very often.

Q. What do you mean by this particular case?

A. I mean, that I have never taken Prussian blue on tea and rubbed it on paper to see if it would come off, but I have seen a great many other cases where there was a distribution of coloring matter between two substances, and such cases approximately follow a very simple law, the so-called simple linear law.

359 Q. Do you agree or disagree with the testimony which has been given, that the Read test is only serviceable for revealing particles of coloring matter which microscopically considered are large?

A. I can only offer an opinion, sir. I have made no personal investigation. My opinion is that it discloses small particles, very small particles that are on the tea leaves themselves.

By Mr. Choate:

Q. I ask you to look at a piece of paper, Complainants' Exhibit 3, examine it through the glass which I shall show you (handing witness exhibit and glass), and look at the blue marks on it? A. (Witness examines paper).

360 Q. Now I ask you to examine Complainants' Exhibit 4 in the same way (handing witness paper)? A. (Witness examines paper).

Q. Now I state to you that these are Read test sheets of two different teas. You say the Read test gives some quantitative results; which sheet indicates the presence of the most color? A. I should want to make a more careful examination; I am not satisfied.

Q. You would; take another look (handing witness papers)? A. I did not anticipate your question (examines papers).

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The Witness: This one shows the more color 361
(indicating).

Q. Exhibit 3? A. Yes.

Q. It shows a great deal more color, doesn't it?

A. It does, to me.

Q. You state that the terms "chemical test" and "chemical analysis" are interchangeable? A. Chemical test and chemical analysis? No, I said the distinction between chemical test and a qualitative analysis was one of degree only, that the terms were interchangeable in my mind.

Q. They are interchangeable in your mind? A. Yes.

Q. So that if you examined a complicated substance, containing twenty or thirty different chemical compounds or elements, and demonstrated the presence of each of those, by perhaps fifty different distinctly chemical processes, you would still think it appropriate to call that a chemical test? A. Certainly, test it for each of those things. There is a test for each of them, and a test for the combination.

Q. Don't you know, Dr. Cameron, in your own mind, that if you were describing that you would invariably use the term "chemical analysis"? A. I cannot admit that, sir.

Q. You would not? A. I might or might not say analysis; I might or might not say test.

Q. When you say the terms are interchangeable, you mean solely in your own mind, or do you think they are interchangeable in the public understanding? A. No. I think that is common usage.

Q. Common usage? A. Common usage.

Q. And therefore, when the man in the street says chemical analysis, without saying anything more about it, he refers to a process which merely shows the presence or absence of some one sub-

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364 stance? A. Well, but as a trained chemist it never occurred to me to give any very great consequence to the terminology used in the street; when it is used by chemists I think the terms "analysis" and "test" are interchangeable.

Q. So your testimony referred to your understanding of the term as used by scientific men, and not as used by laymen? A. Yes, sir.

Q. You state that in your opinion the regulation 22 provides for a chemical analysis? A. I do.

365 Q. It was your opinion, if I am not mistaken, that it provided for a chemical analysis even without the identification of the coloring matter by the chemist? A. It was, and still is.

Q. And still is; so that in your opinion a process is a chemical analysis which by purely mechanical means separates the substances, one substance from another, and tells you nothing about either, except that one substance is blue and the other is not? A. It may or may not. If you wish me, I will be perfectly willing to state why.

Q. No, I want an answer to that question, if I can get it? A. Well, the answer is that it may or may not be a chemical analysis, dependent upon the parties.

366 Q. If that is all the answer you want to give, I am content? A. Dependent upon the parties.

Q. If you want to give some more answer, go ahead? A. I say, the purpose of a chemical analysis is to disclose a substance having characteristic properties, and for the purpose of the examination, whether it is a chemical examination or any other examination, if it discloses the characteristic properties so that you can identify the substances, it is a chemical analysis; but as a matter of fact, all operations involved in a chemical analysis are mechanical, or what you might

call physical; there are no other operations possible. 367

Q. And all substances are chemical? A. All substances are chemical.

Q. So that all separations of substances, in your mind, is chemical analysis? A. Not at all. In the mechanical analysis of soils, of which 2,000 to 2,500 are made annually in the laboratory under my supervision, the separation, is into particles of different sizes without regard to what the particles are composed of. And that is the significance of a mechanical analysis, it is the connotation usually given to mechanical analysis among scientific men. 368
If we go further, as we do in our mineralogical analysis, and determine the composition and characteristics of any of these particles, it then becomes a chemical analysis.

Q. So that if you take granulated sugar in the barrel and separate the sand from it by hand, you would consider that a chemical analysis? A. If I did it in such a way that I recognized it was sugar or sand, or if I long before knew it was sugar and sand, I would call it chemical analysis. If I tasted it, I should certainly say it was chemical analysis.

Q. As I understand it, you do not pretend that regulation 22 gives any means of ascertaining whether or not the teas examined by it contain any other impurity than color? A. No. 369

Q. Or facing? A. It discloses anything which will give a streak, a color.

Q. So that in any event, the tea may be full of every other variety of foreign substance, impurity or filth, if you like, and the Read test, or test by regulation 22, will show nothing about it? A. It will show nothing about it.

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370 REDIRECT-EXAMINATION BY MR. WEMPLE:

Q. The screen that is used for simply sifting this tea, Doctor, is 40 mesh to the inch, I believe; do you recollect that? A. I am not certain of it.

Q. It being 40 mesh to the inch, whatever the relation which particles of Prussian blue may have to each other, they certainly are very small in any event compared with a 40 mesh to the inch screen; that is a large hole, as far as any microscopic matter is concerned? A. Yes.

Q. Is that a large enough hole for the particles of the tea leaves themselves to go through? A. Oh, 371 particles of the tea leaves might certainly be fine enough to go through.

Q. And do they in fact go through, according to your observation? A. I think, unquestionably.

NEW YORK, June 4, 1914.

HENRY C. SHERMAN, called as a witness on behalf of the Respondents, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. WEMPLE:

372 Q. Will you state your profession, Doctor? A. Teacher of chemistry.

Q. In what institution? A. In Columbia University.

Q. How long have you occupied that position? A. I have taught chemistry there since 1899.

Q. Were you educated as a chemist? A. Yes, I was educated first at Maryland Agricultural College, and afterwards specially in chemistry at Columbia University.

Q. And have you practised your profession otherwise than as a teacher? A. Yes, as an investigator

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as well as a teacher, and to some extent as consulting chemist. 373

Q. Have you read and become familiar with Article 22 of the Tea Regulations of 1913 of the United States? A. I have.

Q. I ask you whether or not, in your opinion, the method described in Article 22 is a chemical analysis?

Mr. Choate: I have only to interpose the same objection there, on the ground that the question is not whether it is a chemical analysis, but whether it is a test by chemical analysis of particular things required by the statute. 374

Objection overruled; exception for the Complainants.

The Witness: In my opinion, it is.

Q. Is there in your opinion, Doctor, a distinction between a chemical test and a chemical analysis?

A. No, I think not; the term "test" is commonly applied to a short or simple analysis, but the term "analysis" I think covers tests.

Q. In your opinion, then, if a method is a chemical test it is necessarily a chemical analysis? A. Yes.

CROSS-EXAMINATION BY MR. CHOATE: 375

Q. Doctor Sherman, do you admit the existence of such a thing as a mechanical analysis? A. Mechanical analysis? Yes.

Q. I think you testified before the General Appraisers, on the proceeding about the Read test there, did you not? A. Yes.

Q. If I am not mistaken, you gave an example of what you considered to be a mechanical analysis at that time, didn't you? A. I think so.

Q. Can you state what that example was? A. I

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376 don't think that I could be sure what example I gave.

Q. Don't you recall when I suggest to your memory that it had to do with a chair? A. I believe—yes, I think I did.

Q. Now can you state it to his Honor? A. I think that it was to the effect that a mechanical analysis would be an analysis with reference to the parts of an article, such as a chair, without reference to their composition.

377 Q. You said in substance, didn't you, that it would be a mechanical analysis if you broke the chair you were sitting on and took it to pieces in that way and examined the pieces? A. Yes, as to their size or form, not as to their composition.

Q. Not as to what they were made of? A. Yes.

Q. I believe that your idea was that if you examined them long enough to find out that they were made of wood, that would be a chemical analysis? A. Yes.

Q. That would be a chemical analysis? A. If the question were as between wood and metal, for instance, if the analysis is to determine whether the material is wood or metal, that would be a chemical analysis.

378 Q. Now, Doctor, supposing a man came to you and handed you a box containing a substance which he did not tell you anything about, and which you know nothing about, and said, "Please give me a chemical analysis of that"; what would you report to him? A. I should not undertake an analysis on such instructions as that; I should ask further particulars.

Q. Let us see if you wouldn't; we will suppose that a valued—you call them clients in your profession—a valued client of yours, setting sail from Australia, had previously sent you by letter such

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a package, with just such a message, so that you 379
could not get to him, could not find out what he
wanted, could not find out anything about it, but
he asked you to have a chemical analysis of the
substance ready for him by the time he arrived a
month later, and you knew that his business was
very important to you, and it was desirable that
you should do it, you would undertake it under
such circumstances, I suppose, wouldn't you? A.
If I were in a position where I would take it under
such circumstances, then I understand your ques-
tion to be what would I do?

Q. What would you do, not what processes would 380
you go through, but what would you try to find
out for him? A. Under such circumstances, if I
was sure that the case justified it, I would try to
make the analysis as complete as possible.

Q. What would you try to do, what would you
try to be able to inform him? A. I would try to
be able to inform him in regard to the composition
of the material, the substances present in the ma-
terial.

Q. What was in it? Well, you would have to go
further than that, wouldn't you, if he simply asked
for a chemical analysis and nothing more? You
would have to tell him how much of each thing was 381
in it, wouldn't you? A. To be as complete as
possible, how much was in it, yes.

Q. And if he asked you nothing whatever but for
a chemical analysis of the substance, specifying
nothing else, you would have to give him both a
quantitative and a qualitative examination as far
as you could, would you not? A. If the term
"chemical analysis" were understood to be a com-
plete chemical analysis, yes.

Q. No, but I am asking simply if he said to you
nothing but "I want a chemical analysis of this

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382 substance", nothing else, there is no escape from that, is there? A. In order to be sure to cover everything that he wanted, the analysis would have to be complete, yes.

Q. So that, if he did not specify, the examination would have to be complete? A. Yes.

383 Q. Now, then, supposing he brought to you two substances, two packages of the same substance, the same kind of substance, and he said, "I want you to make me a chemical analysis of these two packages, to determine which of them is the purer", what would you report to him there, supposing again that he said nothing more and that you had no opportunity to ask him any questions in order to get any answers? A. It would depend upon the nature of the substance whether "purer" meant presence or absence of adulteration, or whether it meant a larger quantity of the valuable constituents; in some cases one, and in some cases the other.

384 Q. I am assuming it is a substance you know nothing about, and as to which nothing is said in regard to the meaning of the word "purity" other than its usual dictionary meaning of absence of foreign substances? A. The usual proceeding in such a case would be to find the main substance, the substance of chief significance, and then look for the impurities which are likely to be present.

Q. You would look for all impurities, wouldn't you? A. Usually not all impurities, no; all that are likely to be present or of significance in that kind of substance.

Q. I am assuming, you remember, that it is a substance you know nothing about, but a substance, the overwhelming mass of which is composed of the same substance, so your problem evidently is to tell what the foreign substances were in

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that substance. Now, then, in such circumstances 385
you would report all the foreign substances,
wouldn't you? A. Usually not.

Q. All that appeared in amounts sufficient to be
traceable? A. Usually not.

Q. Why not? A. Because usually the nature of
the main substance would guide you as to what im-
purities were significant.

Q. In other words, when you knew the main sub-
stance and know something about it, you would
assume that some foreign substances will be im-
portant in connection with that substance, and
some will not? A. That is the usual case, yes. 386

Q. That is equivalent, is it not, to having the
person who asks you for the analysis tell you that
he wants certain information; the same thing,
isn't it? A. Will you kindly repeat the question?

Q. (Pending question read) Or information as
to certain ingredients only? A. Partly equivalent,
yes.

Q. Now I want you to clear your mind from all
that preconceived notion that you have been told,
either by the person who comes to you for the
analysis or by your own previous experience, any-
thing about what is wanted in the way of informa-
tion as to particular ingredients. A man comes to 387
you simply asking for chemical analysis to deter-
mine whether sample A is purer than sample B, or
vice versa; would you not, under such circum-
stances, necessarily report all foreign matter, so
far as you were able to trace it? A. No.

Q. Now, then, why not? A. Because my train-
ing and experience as a chemist would lead me to
test for the things which are significant, not for
impossible things.

Q. What kind or class of foreign matter would

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388 you not report? A. It would depend entirely on the nature of the substance.

Q. Supposing the substance was something which was intended to be eaten or drunk, what kind of substances would you not report? A. The question is too general; I could not answer it in that general form.

Q. But the question is general here, and I am putting the question generally on purpose. I am asking you to say what you would do under a given set of conditions. If you cannot say that, I wish you would so state? A. You seem to be describing conditions which are quite foreign to the experience of the chemist.

Q. Well, Doctor, we will come down still nearer to the point: Supposing that a client of yours should bring you two samples of tea, or should send you two samples of tea with a letter saying, "Please analyze these chemically and tell me which is the purer," and you were unable to reach him to find out what he meant by "purer"; what would you do then, what would you report to him then? A. If I undertook the analysis, I would report to him in regard to the presence or absence of leaves other than tea leaves, and of such adulterants as we think it worth while to look for in tea, colorings, facings, and so on.

Q. Clay? A. Yes.

Q. Foreign leaves? A. Yes.

Q. Salts of copper? A. I am not prepared to go into detail as to the things which I would look for in tea; I am not a specialist in examining tea.

Q. You are not a specialist in tea? A. No.

Q. In tea examinations? A. No.

Q. Would you look for exhausted leaves? A. I don't remember the wording of your previous ques-

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tion, therefore I am not sure whether exhausted leaves would come under that, or not. 391

Q. The chemical analysis we are dealing with now is one for purity only, comparative purity of two samples submitted to you by a customer, a client? A. Purity, in a general sense, would cover the question of presence or absence of exhausted leaves, I think.

Q. Would you look for sand? A. Probably.

Q. Would you look for organic impurities? A. No, I would not report organic impurities, that is too indefinite a term, no.

Q. Would you look for micro organisms? A. I think not. 392

Q. That is because it is a chemical analysis, you would not find it by chemical analysis? A. (No answer.)

Q. All right. Now, then, why would you limit your search to this particular— A. (Interrupting) I did not make any answer to that question.

Q. I will withdraw the last question altogether. Why would you limit your examination to these particular impurities and no others? A. I am not sure that I should. As I said a few moments ago, I am not a specialist in the examination of teas. I have not looked up to see all the things that might possibly be significant in regard to the purity of tea. 393

Q. Then what you would do would be to look up in the books to see what was thought significant by other persons, and then look for those impurities? A. I would begin that way, and then if the case seemed to require it I would go on and make investigations on my own account.

Q. So if you found any unexpected impurities, you would report them, too? A. Yes.

Q. And you would make your examination such

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394 as was likely to discover both the expected and the unexpected impurities? A. Yes, assuming, as I said before, impurities which I thought significant.

Q. In other words you would not limit yourself to one form of impurity and examine only for that?

A. No, under the general question of purity I certainly would not limit myself to one form of impurity.

395 The Court: I don't see how any man, whether he is a chemist or not, no matter what his occupation may be, can look for or even think of looking for impurities, until he has established in his own mind a standard or description of purity. Impurity presupposes, no matter to what object the word may be applied, a departure from standard; that must be true. Consequently, no man, I care not what his training, can declare impurity unless he has determined in his own way a standard material.

Mr. Choate: I don't know that I quite understand what your Honor means there. I would like to ask some questions on that subject.

396 The Court: You asked the question, what would you do if some one asked you to find out whether this was pure tea, whether it was pure tea or whether there were impurities in the tea? Now, then, how can a man answer that question? How can he go to work until he has some consciousness perhaps, or has said to himself, "Pure tea is thus and so; now I will go and see whether there are any aberrations from the normal which I have thus established." That is an assumption.

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Q. What has been your definition, the definition 397
of "purity" as you have been using it in answering
my questions, Dr. Sherman? A. I have not been
able to apply any definite criterion, because your
questions have all been so indefinite.

Q. I have used the word always in the sense of
absence of foreign matter, and I mean by that ab-
sence of matter other than that which is the chief
constituent, which constitutes the main body of the
substance to be examined? A. If you had ex-
plained that earlier, some of my answers might have
been clearer. You didn't make that explanation in
asking your questions.

Q. Now let me see; let me put again, then, with 398
that definition in mind, the last question I put, the
hypothetical question. Your client comes to you
with two packages of tea, and the message, "Please
chemically analyze these and tell me which is the
purer", and you understand "purity" is used in the
sense of foreign matter, absence of matter which is
not tea. Now, do you want to modify your answer
to that question? A. Certainly, in one respect. If
the question of purity were limited to the presence
or absence of foreign matter, that would not cover
the question of exhaustion or partial exhaustion of
tea leaves.

Q. Partially exhausted leaf, but otherwise on 399
such a message your effort would be to give the full
information as to the foreign— A. (Inter-
rupting) The question you raised in regard to
sand and clay and organic impurities, foreign mat-
ter, if the criterion of purity is the presence of
foreign matter, that would require discrimination
as to whether clay found in the analysis might pos-
sibly have been a natural constituent, the mineral
matter might be a part of the natural mineral mat-

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400 ter of the tea, or whether it were added clay or added sand.

Mr. Choate: I assume, of course, you would have to make up your mind as to what constituted pure tea, as his Honor says, in the absence of what the constituents of pure tea were, so that you might determine what, when found, was foreign matter. That is true, of course.

Q. Now, then, when examining a food product with respect to purity, wouldn't you also consider it an element to consider whether any valuable ingredient had been withdrawn from the substance?

401

A. On the general question of purity, yes.

Q. So that if you were reporting on the two samples for purity generally, in the sense that I have used, you would include both a report on the presence of foreign matter and a report on the withdrawal of ingredients, normal ingredients, if there were any? A. Usually, yes.

Q. There were two other impurities that I would like to know whether you looked for in tea, under the circumstances of my last hypothetical question. Would you look for added tannin extracts? A. I have no information at present that would lead me to look for them.

402

Q. Or for catechu, as it is called? A. I remember only vaguely in regard to the question of catechu in tea, and I am afraid I am not prepared to say now whether I would look for that or not.

Q. But if you found that they were regarded as important adulterants by some text book writer, you would look for them and report them? A. Well, not necessarily some text book writer, but if I found that they—

Q. By some important text book writer? A.

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Yes, that they were commonly regarded or au- 403
thoritatively regarded as important adulterants,
then I would look for them.

Mr. Wemple: That is all, Doctor. I will
call Dr. Wiley.

Mr. Choate: Is Dr. Wiley called as a chem-
ical expert?

Mr. Wemple: Not on chemical analysis.

HARVEY W. WILEY, a witness called on behalf of
the Respondents, being duly sworn, testified as
follows:

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DIRECT-EXAMINATION BY MR. WEMPLE:

Q. What is your profession, Doctor? A.
Farmer.

Q. And have you an avocation? A. I was
formerly Chief Chemist of the Department of Agri-
culture, for twenty-nine years; previous to that I
was professor of chemistry in Purdue University
in Indiana for nine years, and State Chemist of
Indiana for two years.

Q. While you were in the Department of Agri-
culture and since have you had an extensive experi-
ence in food products, their analysis and character 405
in general? A. Yes, sir.

Q. Have you familiarized yourself with the ap-
plication of Article 22 of the Tea Regulations of
1913? A. Yes, sir, to the extent of examination for
color only.

Q. Have you manipulated the process described
in that article? A. I have.

Q. I ask you, based upon your experience with
food products in general, whether in your opinion
the presence of artificial coloring matter in tea con-
stitutes an impurity? A. I consider that it consti-

406 tutes an adulteration, and that of course might be considered an impurity.

Q. Have you any knowledge or opinion, based upon your experience, concerning the harmful or unharmed character or effect on the human system of Prussian blue taken into the alimentary canal?

Mr. Choate: I thought you said that Dr. Wiley was not called as a chemical expert?

407 The Court: No, I cannot permit any examination on that line, you having stated that you are not prepared to offer any positive testimony to show that any of the coloring matters with which we are really concerned here are positively injurious, although you do introduce some opinion evidence to that effect.

Mr. Wemple: Your Honor allows me an exception to the ruling.

Q. Doctor, in your application of the method prescribed in Article 22, are you able to state what character of material would pass through the sieve that you used on to the white paper? A. Well, in a general way I can. It consisted of fine particles, and a large number of them, a good many of them, 408 are fragments of the tea leaf, as shown by their color which they produce on the white paper when mashed with a spatula. The vast majority of the materials which pass through the sieve, of the samples I tried, were fragments of tea leaves. In addition to that, there were other matters which I did not seek to identify, except for the coloring matter that passed through.

Q. How were those particles of tea leaves that passed through on to the paper disposed of? A. The particles of tea leaves were composed of the tea leaves.

Q. How were they disposed of after they went on 409
to the paper and before you made any examination
for color? A. They were pressed forcibly, by a
spatula, on a piece of white paper held on a glass
surface; the particles were mashed and smeared on
the paper, and many of them adhered to the paper.
Those that did not adhere I brushed off before
examination; I only examined those that adhered
to the paper.

Q. And after the crushing process you applied
the microscope to the paper? A. I applied it after-
wards, the microscope or magnifying glass; it was
a single lens. 410

Q. What did you observe upon the paper, aside
from blue color? A. I observed innumerable
splotches of yellow color, yellowish green color.

Q. And are you able to say with reasonable cer-
tainty what that yellowish green matter was that
was on the paper? A. I think I can say so with
absolute certainty.

Q. Please do it? A. It was composed of chloro-
phyl and its container xanthophyl.

Q. Is that an integral part of the tea itself? A.
It is a part of the tea itself.

Q. May I ask you, Doctor, if this method de- 411
scribed in Article 22 of the Regulations, is in your
opinion, and based upon your experience, a proper
method of separating, preparatory to identifying,
the added coloring matter from the tea?

Mr. Choate: I object to that.

The Court: I don't understand that is the
point in conflict.

Mr. Wemple: Well, sir, I am not sure
whether it is or not.

The Court: The complainants' testimony
has admitted that, provided the coloring mat-
ter be not in intimate union with the tea, and

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412 if the particles of coloring matter be microscopically speaking large, that the test or method provided in Section 22 does reveal the presence of such coloring matter.

Mr. Wemple: That is all; that is correct, sir.

The Court: I consider that established beyond all question.

CROSS-EXAMINATION BY MR. CHOATE:

Q. Doctor, you are aware that all tea contains dust, are you not? A. I believe it does, yes, sir.

413 Q. And it contains specifically tea dust, doesn't it? A. Fragments of tea leaves, do you mean by that?

Q. Yes? A. I think it does, yes.

Q. In many sorts of tea the tea dust, that is consisting of fragments of tea leaves, amounts to five or six per cent of the total weight of the tea? A. I don't know anything about that; I don't know anything about the proportions.

Q. You recall that in the regulations themselves, certain teas are excluded only if the dust runs beyond that? A. Well, I have only examined the regulations in relation to this particular test.

414 Q. These regulations were not in force when you were in the department? A. I don't know that they were.

Q. The Read test was not then in existence? A. I think not.

Q. Do you know by whom the Read test was invented? A. Yes, one of my assistants.

Q. Who was it? A. Miss Read.

Q. And she is what? A. She is a micro-chemist in the Department of Agriculture.

Q. Is she still there? A. I believe she is.

Q. Doctor, you have stated in your opinion color-

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ing matter is an adulterant in tea; was that always your opinion? A. I beg pardon? 415

Q. Was that always your opinion? Did you always consider coloring matter an adulterant in tea? A. I don't know that I have always; I have frequently changed my opinion during my life.

Q. Is it the only adulterant of tea? A. No, I think not.

Q. Tell us some of the others? A. Well, I think the facing of tea is adulteration.

Q. But outside of those two, I consider them together because they are applied together if at all? A. I didn't understand your question; I am a little hard of hearing. 416

Q. Let us have other adulterants than coloring or facing? A. Foreign leaves.

Q. And still others? A. Exhausted leaves.

Q. And still others? A. Well, I have not had my attention particularly directed to others, or their nature.

Q. Doctor, you prepared a little book on the subject of teas for one of the government's publications, once, did you not? A. It was prepared under my supervision, by my assistants.

Q. And issued under your name, over your name? A. My name was on the title page, yes, as chief of the laboratory. 417

Q. Is that the book which I now show you (handing witness pamphlet)? A. That is the book, yes, sir.

Q. Does this book accurately state your views on the subject of tea at the time it was published?

A. Well, it contains the views of Dr. G. L. Spencer.

Q. You don't wish to disclaim those views, do you? A. No, I don't disclaim them; they were published by my permission and authority; I claim them to that extent.

418 Q. On page 880 of this volume I find the following statement; I call your attention to it, and ask if that represented your views in 1892:

"The treatment of teas with various coloring matters, a process termed facing, comes properly under the head of adulterants. Facing consists in treating the prepared leaves with mixtures containing Prussian blue, turmeric, indigo, or plumbago to impart some favorite color or gloss to the leaf and always has a fraudulent intent. Leaves which have been damaged," &c. It goes on about some other matters.

419 "There is no evidence that these facing agents are deleterious to the health in the quantities in which they are employed, but inasmuch as they add a useless foreign matter to the teas for the purpose of deception their use should be discouraged. 'Prussian blue is insoluble in water and alcohol.' " This is a quotation from the United States Dispensary, 14th Edition, page 1171. "It is deemed a tonic, febrifuge, and alterative, but is at present rarely used. * * * The dose is from 0.2 to 0.33 gram repeated several times per day and gradually increased until some effect is produced.'

420 "In order to take the amount of Prussian blue stated above as a single dose in the form of tea-facing, one would have to consume nearly a pound of tea. It would require a long time under these conditions for even an inveterate tea-drinker to consume this amount of Prussian blue."

Did that represent your sentiments in 1892? A. Well, the first part —

Mr. Wemple: Just wait a minute, please, Doctor; it seems to me, your Honor, that is the question I asked.

The Court: I don't see the reason for that or its materiality. So far as I, as a lawyer,

am concerned, I have got to regard that I have
an admission from counsel, which I interpret
to mean that it is not material at all, and that
it is not shown by any balance of testimony,
by any fair preponderance of proof, that any
coloring matter under consideration in this
case is or is not injurious to health. 421

Mr. Choate: I was of the impression that we
had positive evidence that they were harmless,
because they were insoluble and therefore
could not be taken into the human system.

The Court: The impression was of several
of your witnesses that they were inert. 422

Mr. Choate: I shall have to ask to recall
them on that subject, although I thought the
evidence was clear.

The Court: I cannot see the materiality of
it. This statute nowhere says that the tea
shall be excluded because it contains or may
contain materials injurious to human life, or
in other wards, somewhat like the Pure Food
Law.

Mr. Choate: No, but it does say that tea
shall be excluded on account of any impurity
whatever, if the quantities are greater than
the standards. 423

The Court: As I have said before, you must
understand the meaning of purity before you
can say what is impure; and I may say that
it seems to me that the testimony down to date
on that point is not very clear. I should infer
that the government has made certain stand-
ards of purity by the creation of the standard
samples at the different ports of the country.
It appears to be the practice to lay up a supply
of sample tea in the various ports of the coun-
try; when any importer offers tea to be brought

424 into this country, the offered tea is compared with the sample. Now it seems to me that the government has said in substance, "Go to the Custom House, get a sample; that sample is pure enough for us. If your tea grades up to or above that sample, why then we will let you bring it in; and if it does not, then you cannot bring it in." Now, when we get down to this case, your bill, Mr. Choate, is framed on the theory that you have offered certain tea, to which the government was going to apply a certain test which you said was unlawful.

425 That raises a question on the meaning of the words of the statute, as to whether Section 22 is a lawful method of testing tea. It has rather leaked out here that these particular teas that are mentioned in your bill were at some time prior to this hearing, of course, actually tested by a chemical analysis according to any definition that you have applied, and that the facts ascertained were that one specimen taken of your tea contained nineteen parts in a million of Prussian blue, and the next one contained twelve parts in a million, and the third one contained ten parts in a million of Prussian blue; and that was considered

426 impurity.

Mr. Choate: I think your Honor is laboring under a misapprehension there. I perhaps did not bring it out because I thought we all admitted it, but I have no doubt Mr. Wemple will admit that this chemical examination was no part of the government's examination in the rejection of the tea. That is the fact, isn't it, Mr. Wemple? It was made for the purposes of this case?

Mr. Wemple: I don't understand that; I don't quite get your meaning, Mr. Choate.

The Court: It was not stated why it was 427 made.

Mr. Choate: I understand that.

The Court: It was merely stated that it had been made by a gentleman named Pain.

Mr. Choate: Yes. It was not your contention that that chemical analysis was made at the port by the examiner?

Mr. Wemple: No, no; that was a test, that was merely to show what we had in answer to some testimony of Dr. Deghnee.

The Court: It was confirmatory.

Mr. Choate: It was made in preparation for 428 this case.

The Court: But it was introduced in evidence as confirmatory of the results that would be shown by the Read test of the various teas.

Mr. Wemple: Of course, the examiner at the port used the Read test, and that is why the tea came to the Board.

Mr. Choate: I don't think I can yet have made myself clear, or else I don't understand your Honor's remarks on the subject of the standard of purity. Of course, the government standard is a standard of purity in the sense in which your Honor is using it. Teas less pure 429 than the standard cannot come in; teas more pure must be allowed to come in. But that does not assert for a moment that the government standard contains no impurity, or that everything which is in the government standard is to be considered as tea.

The Court: Oh, yes, I quite agree to that, yes.

Mr. Choate: And my contention, of course, is, and I must re-state it until I am certain that I have not stated it incorrectly, that the

430

government standard may contain, and in the case at bar is shown to contain, so much impurity that a reasonably clean other tea coming in will contain much less total impurity, even if it contains some color and the government standard contains none.

431

The Court: That is perfectly true. It has been shown, I think I am right on my facts, that this particular tea of yours has been compared with the government standard, government standards 5 and 6 of Young Hyson and Gunpowder; that in the opinion of a man who makes his living by importing and selling tea, whereas the government standards 5 and 6 were worth so many cents a pound, the teas that you offered were worth, if my memory serves me, between three and four times as much.

Mr. Choate: Yes.

The Court (Continuing): As the government standard teas. If you talk about foreign matters, that is, matters that do not grow on the tea tree or bush, there were far more in the government standard than there were in your tea.

432

Mr. Choate: If your Honor has that in mind, that is all I care about.

The Court: But it is admitted that these particular teas that you make the subject of this suit, did both by the Read test, no matter whether it is lawful or not, and by an ultimate chemical analysis, contain a larger proportion of Prussian blue than the government standard.

Mr. Choate: That is the fact, or rather, a larger proportion of color. I didn't say of Prussian blue.

The Court: Well, color. I think it is pretty fairly well shown it was Prussian blue.

Solomon F. Acree.

SOLOMON F. ACREE, a witness called on behalf of the Respondents, being duly sworn, testified as follows: 433

DIRECT-EXAMINATION BY MR. WEMPLE:

Q. Will you state your profession, please, Doctor? A. I am a chemist in Johns Hopkins University.

Q. How long have you been there? A. I have been there nine years, I think.

Q. Teaching chemistry? A. Yes, sir.

Q. Have you practised aside from teaching? A. I have been Assistant City Chemist in Chicago, and I have been connected with a number of port cases, without mentioning the details. 434

Q. Doctor, I ask you if you have studied and performed the test prescribed by Article 22 of the Tea Regulations? A. I have.

Q. And have you also made chemical tests or analyses by other methods upon the teas described in the bill of complaint? A. Yes, I have determined ashes, for instance, from them.

Q. Have you determined in the course of those examinations also the quantity of Prussian blue in the Q. U. I. teas 5, 6 and 7? A. No, I have not determined those quantitatively; I have determined that Prussian blue was present. 435

Q. Have you made an analysis similar on the government standards? A. I have.

Q. For the purpose of—— A. (Interrupting) Comparison of the Q. U. I. 5, 6 and 7 with the government standards.

Q. Now state briefly what results you obtained? A. The test of the government standards showed no blue spots, no Prussian blue.

Q. Under the Read test? A. Yes, when carried out by the Read test; whereas the Q. U. I. 5,

436 6 and 7, all gave these tests. I have sheets that I can put into evidence, if you wish.

Q. Did you make any other sort of chemical analysis of the Q. U. I. teas, in comparison with the standard? A. I have determined the ashes, for instance, the total ashes, of Q. U. I. 5, 6 and 7.

Q. Before you state your results, will you state upon what theory you make such a determination? A. I wanted to determine whether or not there was an excess of mineral matter, for instance, in the different samples of tea that would be obtained in the ash.

437 Q. Is that a test which furnishes you, as a chemist, with a basis of inference concerning the comparative purity of the Q. U. I. teas and the government standard? A. Yes——

Mr. Choate: One moment. I object to that, still using the word "purity" in the sense of absence of foreign matter?

Mr. Wemple: Why, yes, I think purity means the absence of everything excepting tea.

By Mr. Wemple:

438 Q. Let me ask you, Doctor, to tell us what inferences you can draw or did draw from the determination of the ash of these two teas? I take it the ash means the result of burning it, doesn't it? A. Yes.

Q. Turning into waste? A. Well, you could tell by that whether, for instance, a whole lot of dirt had blown up from the ground on the tea leaves in one case and not in the other. You see, this ordinary soil contains a lot of mineral constituents, and those would appear as a part of the ash. You can tell whether a whole lot of calcium sulphate, and various sulphates or facing matters, mineral matters, have been added to the teas in excess, and

Solomon F. Acree.

compare the results then with the one that you 439
obtained from the tea in the government standard.

Q. Now state the results which you obtained by
comparing these two samples or the two lines of
tea, in this manner, Doctor?

Mr. Choate: I object, on the ground that
the result as to the method, as so far testified
to, is not adequate to produce any comparison
in any particular.

The Court: Let me hear the question.

Q. State the results that you obtained, Doctor,
by comparing the two kinds of tea in question, by 440
means of the ash?

The Court: I will let him answer that.

Mr. Choate: Your Honor will note my ex-
ception?

The Court: Yes.

The Witness: The general results are that there
is comparatively little difference in the Q. U. I. 5,
6 and 7 and the government standards, Gunpowder
and Young Hyson.

Q. How much do you mean by the phrase "com-
paratively little"? A. Well, a difference about,
say, 10 per cent, something like that, in total ash 441
I am speaking of now.

Q. In favor of which tea? A. Well, there isn't
very much difference, as far as I can see. If any-
thing, it would favor the other side, favor the Q. U.
I. 5, 6 and 7.

The Court: Now wait a minute. That
doesn't mean anything to me, unless I am per-
mitted to guess that the witness thinks it is
an advantage to a tea to have little left; is
that what you mean?

Solomon F. Acree.

442 The Witness: Yes, I should have stated that.

Q. Did you make any examination of the ash in the two cases, or in the two lines, for the purpose of arriving at any conclusions as to purity? A. I made the qualitative analyses of the different ashes, and found that in general the composition of the two ashes, of the ashes from the government standards and the ashes from the Q. U. I. 5, 6 and 7, were about alike; that is, the total ashes.

Q. What composition did you find for the two ashes, then? A. Well, they all contained silica,
443 phosphorus, iron, sulphate radical—

Mr. Choate: Iron, sulphate, what is the next?

The Witness: Sulphate radical, sulphates, in other words; aluminium, calcium, magnesium.

Q. Now turning, Doctor, to the subject that was adverted to the other day, as to the ability of the Read test to discover bits of color that were applied to tea and applied in close physical connection with it, I ask if you have made any experiments in order to determine that question? A. I
444 have.

Q. Will you state what you did in that respect?

Mr. Choate: Now "in that respect" is rather indefinite.

Q. Well, then, let me ask you if you took some soluble coloring matter and sprayed it on to tea?

A. I have—

Q. Just answer that, please, Doctor, if you did?

A. I have, yes.

Q. You did that? A. I have conducted these experiments, yes.

Q. After spraying this color in solution on to the tea, what further did you do? 445

Mr. Choate: What difference can it make what result this witness got from a particular experiment of this character? Supposing he colored teas and got no appearance of color on the one hand, or that he colored them and got tremendous Read tests on the other, what difference does it make? How does it contradict even one of our witnesses?

The Court: I cannot say.

Mr. Wemple: There has been a good deal made here on the other side about Dr. Deg- 446
huee's statement that if the color was applied in fine enough particles and in close enough connection with the tea leaves, then the Read test would be helpless.

The Court: You may take the answer.

Q. Go ahead, Doctor.

Mr. Choate: Your Honor will note my exception?

The Court: Yes.

The Witness: I tried the experiment with crystal violet, for instance.

Q. State what that is, please? A. That is one of the aniline dyes. 447

Q. Soluble in water? A. Soluble in water. I made solutions of crystal violet in water, having such concentration that when this crystal violet is applied to the tea the concentration, or the amount in the tea, would be about one part in 50,000.

Q. Well, after applying it, what did you do? A. Then the tea was examined when dried by the Read test, and it was shown on the white sheets of paper that the crystal violet had gone through the sieve and was present on the paper.

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448 Q. Is this sheet that I show you the result of your application of this process (handing witness paper)? A. Yes, that is one of them.

Q. Is that another (handing a second paper)?
A. There is another one.

Mr. Wemple: I offer them in evidence.

Mr. Choate: I object to them as immaterial, on the grounds stated before, and irrelevant.

The Court: They may be admitted.

Mr. Choate: Exception.

Marked Respondents' Exhibits A and B.

449 Mr. Wemple: I want to offer one more. I think the Doctor can identify this (handing paper to witness).

The Witness: Yes, this is another one showing experiments in which I had added enough crystal violet to make four parts in 50,000.

Papers marked Respondents' Exhibit C.

450 The Witness: To continue my answer, my object in carrying out these experiments was to learn whether or not a substance can be applied in a very finely divided state, even in solution, and could yet be detected in the tea. When you put an insoluble substance, like Prussian blue, on the tea, and heat up the tea, it might be that some of that Prussian blue would stick to the tea, would not come off very readily, and there would be doubt then that the test is accurate. Now, in order to subject this test, then, to a very severe criticism, make a very severe test, I wanted to take a substance that could be made soluble, could be put on the tea, the tea could then be dried, and then see whether or not in the rubbing of the tea in making this test, some of this coloring matter could come off, perhaps with the particles of the tea leaves, or perhaps with the dust of the tea, I mean cal-

cium sulphate and other things, for instance, not 451
Prussian blue.

Q. Now, Doctor, did you use this method in connecting with Prussian blue? A. I have.

Q. Will you describe your processes there, and your results?

Mr. Choate: I object to this also as immaterial, your Honor.

The Court: It may be admitted.

Mr. Choate: Exception.

The Witness: I have made tests by spraying Prussian blue on tea.

Q. Well, in what form was the Prussian blue, 452
Doctor? A. That was the very finely divided Prussian blue, known as the colloidal Prussian blue.

Q. What does that mean? A. That means, briefly stated, it means that the substance is extremely finely divided. I think that is a simple statement enough; extremely, finely divided.

Q. Is it the most finely divided preparation of Prussian blue known? A. Yes, that would be another way of stating it, I should say. Now I carried out an experiment in which I added Prussian blue to the extent of one part in 30,000. This 453
Prussian blue was, of course, very finely divided indeed. I then took that tea and examined that tea by the Read test, to see if I could detect that small amount of very finely divided Prussian blue. I was able to detect that without any difficulty.

Q. Have you the sheets showing the results of your work? A. I have (producing papers).

Mr. Wemple: I offer them in evidence.

Mr. Choate: Same objection. I suppose the same ruling and exception.

Marked Respondent's Exhibit D.

Solomon F. Acree.

- 454 Q. Are you able to say, Doctor, whether or not the Prussian blue, divided as finely as was the substance which you applied in this case, would be visible under a compound microscope? A. I have not carried out that experiment, but you can see little bunches of particles, even with the naked eye. I could not say directly about the microscope.

CROSS-EXAMINATION BY MR. CHOATE:

Q. I suppose that almost anything can be seen if the particles are bunched largely enough? A. I suppose so.

- 455 Q. From one point of view your own head is a bunch of particles. Doctor, when did you make these experiments? A. Well, you have to tell me of which experiment you are speaking now. Some were made a month or six weeks ago, two months ago, something like that.

Q. Let us start with the examination of the Q. U. I. teas; when did you make that? A. What teas?

Q. The Q. U. I. teas? A. Q. U. I. teas; I suppose six weeks ago; I cannot say.

Q. Six weeks ago? A. Yes, something like that.

- 456 Q. You made it in preparation for this case? A. Yes.

Q. Not as a part of any government examination? A. No.

Q. And how about the examination of the Government standards 6 and 7? A. They were made at the same time.

Q. At the same time; when did you make the experiments with coloring teas with crystal violet and with Prussian blue? A. Some of those experiments were made about a month ago, I should say; but the ones offered in evidence were made again

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yesterday to have fresh samples, fresh sheets to 457
show here.

Q. Made after hearing Dr. Chandler? A. Yes.

Q. Now I notice that you used—— A. (Inter-
rupting) I stated that, if I may continue, I stated
that I had made some experiments previously.

Q. On teas? A. Yes, on teas.

Q. In preparation for this suit? A. Yes, to get
the truth in regard to this suit; that is what I was
interested in.

Q. We assume that, Doctor; that is what we are
all after. Now, Doctor, I notice that in spraying
that Prussian blue, in putting Prussian blue on, 458
you used one part in 30,000; that is nearly twice
as much as was used in Dr. Chandler's experiment,
isn't it? A. Well, I don't remember exactly what
he used; if he used one part in 60,000 of Prussian
blue, it would be.

Q. In comparing the ash of the Q. U. I. teas and
the government standards, how much tea did you
reduce to ash in each case for the comparison?

A. Ten grams.

Q. Ten grams? A. Yes.

Q. Did you do that with one specimen of each
of the Q. U. I. teas, and one specimen of each of
the two standards? A. I took each specimen, of 459
course, separately.

Q. But only one specimen of each variety of tea?
A. Yes.

Q. One Q. U. I. 5, one Q. U. I. 6 and one Q. U. I.
7? A. One Q. U. I. 5, one Q. U. I. 6 and one Q.
U. I. 7, yes.

Q. One standard No. 6 and one standard No. 7?
A. Yes.

Q. And as I understand it, what you did was to
take your ten grams and ash the whole of that? A.
Yes.

460 Q. So that everything that was in the ten grams, head, body and legs, leaves, dust, purity and impurity, was reduced to ashes? A. Yes.

Q. And you simply compared that gross ash, if I may use that term, of one tea, with the gross ash of another tea? A. Yes, that is one of the several experiments I carried out.

Q. You say that you found in the ash silica? A. Yes.

Q. And phosphorus? A. Yes.

Q. And sulphate radicals? A. Yes.

61 Q. Those are normal constituents of the tea leaf, are they not? A. Why, I didn't make that statement.

Q. Well, they are, aren't they? A. I won't say that.

Q. Don't you know what the normal constituents of the tea leaf are? A. I can give you analyses taken from other people; I have not made any analysis of normal tea leaves myself, clean tea leaves.

Q. Don't these chemicals appear in the analyses that you have seen made by other people of pure tea leaves? A. Well, now, I can read the laws from the text book, if you wish to know that question.

462 Q. Well, I should like to know it? A. (Referring to papers.) No, I haven't those; I find they are not given here.

Q. I have not looked at it to see, but there are some analyses in the front of this book of Dr. Wiley's, and I venture to say you will find them in that (handing witness book)? A. Well, if you will find them I will read it.

Mr. Choate: In the first few pages of the book you will find the analyses. Perhaps we can save time by Dr. Deghueue getting them out from some other book.

Q. How about iron, wouldn't that be an inevitable part of pure tea leaf? A. I won't answer the question, not knowing the—As I have stated, already, I don't know the analysis. 463

Q. How about calcium and magnesium? A. I have to make the same general answer.

Q. Doctor, isn't it the fact that all the chemicals which you have mentioned are common constituents of almost every vegetable leaf, almost every leaf? A. I don't care to answer you in particular.

Q. What? A. I don't care to answer in particular about this question.

Q. At all events, your comparison made no distinction between the ash which was tea ash, and the ash which was the ash of other substances? A. No, that gave the total ash. 464

Q. Now, then—— A. (Interrupting) That is what I find generally described, for instance, here in this text on teas.

Q. Aren't you aware that the total ash in pure teas varies very greatly? A. In the analyses that I made, do you mean?

Q. Not in the analyses that you made, but in the analyses that other people have made? A. Well, they vary a few per cent, yes; I find, for instance, in this text here that they vary a few per cent. 465

Q. Now, then, as to your experiments on coloring, how did you apply the crystal violet? A. In solution, sprayed on the tea.

Q. How much tea did you take? A. For instance,—oh, 30 to 50 grams.

Q. 30 to 50 grams? A. Yes, of tea.

Q. You sprayed it with an atomizer? A. Yes.

Q. How did you distribute the substance about the tea? A. Well, it was sprayed on, the tea was put in a container and was mixed around gradually, and as a dry portion of the tea was exposed,

Solomon F. Acree.

466 a small amount of this material would be sprayed on it, and it was thoroughly mixed up. I was very careful indeed to try to get the material spread uniformly through the sample of tea, so that we would have a fair, accurate test of this question.

Q. You say you made it on 50 grams, or 10 grams?

A. From 30 to 50 or 60 grams.

Q. How many times did you repeat the experiment? A. Oh, probably in all I suppose two or three times, with the crystal violet, for instance.

Q. Coloring tea, the 30 or 50 grams of tea you tried it? A. Yes.

467 Q. And then you put that same tea into the sieve and Read tested it? A. Yes.

Q. Just as it was? A. Yes.

Q. Without adding anything else to it? A. Oh, no.

Q. Or any other tea to it? A. No.

Q. Did you take the precaution to clean the sieve first? A. Very thoroughly.

Q. Did you examine it under a magnifying glass or microscope to see if it was clean? A. Well, by dusting it out and shaking it out on a paper you can see whether any material comes off of it.

Q. Did you hold it up to the light? A. No.

468 Q. To see whether any of the holes were stopped up? A. No, I didn't see any.

Q. You took that 30 to 50 grams of tea, and Read tested that just as it was? A. Yes, after it was dry.

Q. Don't you know that the regulation calls for the testing of two ounces of tea? A. It doesn't make any difference how much you test.

Q. I asked you if you did not know that the regulation called for the testing of two ounces of tea? A. Yes, it does.

Q. It does, and 30 to 50 grams is less than 2 469
ounces? A. Yes.

Q. Thirty grams is only about one ounce? A. That
is right.

Q. And you thought it didn't make any differ-
ence if you did it that way? A. It doesn't make
any difference.

Q. Did you get the required amount of dust, or
required weight of dust, in making your test? A.
Why, I didn't weight that dust accurately, it was
not necessary. The object was to see, the object
of these experiments was to see whether or not
this soluble material could be put on these tea 470
leaves——

Q. I understand the object, Doctor; I am asking
you how much dust you got; did you get as much
dust as the regulation required? A. Yes, as far
as we could judge, in general.

Q. So that out of one ounce of tea you got as
much dust as the test regulation prescribes you
should get out of two? A. Oh, no, about half as
much.

Q. Then you did not get as much as the test
prescribes, the regulation prescribes? A. The ex-
periments were carried out under the same gen- 471
eral conditions, to carry out the Read test.

Q. Did you get as much dust as required by the
regulations, or half as much dust? A. I should
say in general we got about half as much dust,
from half the amount of material; that would cor-
respond, however, to the Read test.

Q. When you prepared your solution, was it a
solution in water? A. Yes, in water.

Q. In what form was the crystal violet when
you put it into the water? A. Of course, crystal
violet is a solid.

Q. A solid? A. Yes, it is a solid.

472 Q. Was the water hot or cold? A. Both, it was tried both ways.

Q. It was tried both ways? A. Yes.

Q. Did you take any particular pains to see that all the violet dissolved? A. Yes, I took particular pains about that.

Q. I call your attention to Defendants' Exhibit A, and I ask you to note a mark surrounded by a lead pencil circle near the top of the exhibit, a blue smear, approximately a little over an eighth of an inch long and very nearly a sixteenth of an inch wide, and ask you if that mark is made by the crystal violet? A. I judge so.

473 Q. It was part of the test? A. Yes.

Q. You think that the fragment that made that mark had been dissolved in the solution? A. I do.

Q. You think that a solution—— A. (Interrupting.) And I would like to go further there. The very object of this work was to determine whether or not particles of the water getting on the tea, little droppings, whether those when evaporated would leave these little particles there. Of course they would be finely divided, and I want to call your attention to the fact that it takes an extremely small particle of the material to give this
474 color; this would be, of course, in solution——

Q. What sort of an atomizer did you use? A. One of the ordinary little type that you buy in the market, fixed so that I could attach a test tube and a tube to it, in such a way that I could get my crystal violet on the tea sample. I might say, too, that I have tested a number of other dyes, other soluble dyes, with the same general result.

Q. Was this also yesterday? A. Oh, before; I have tested this question once before.

Q. How much water did you use in these experiments? A. Well——

Charles E. Atwood.

Q. In each? A. In each experiment, you mean; 475
well, say several C C's, enough to moisten it.

Q. Is that cubic centimeters? A. Yes, enough
to moisten it fairly well.

Q. But in making your solution in the atomizer,
how much water did you use? A. Well, as I say,
in all the solution was several C C's.

Q. And then you sprayed the whole of it on?
A. Yes; I was careful to get the amount spread out
on the tea and distributed as uniformly as possible,
to make as fair a test as possible.

Q. Then the result of your spraying was to
moisten the tea? A. Why, naturally the water was 476
put on the tea.

Q. I mean, did it soften the tea, so that it felt
moist to the touch? A. It was fairly moist; you
couldn't put water on tea without getting it somewhat moist.

Q. What was the percentage of gross ash that
you found in the government tea? That is, what
portion of the total weight of the tea turned into
ash on your process? A. I should say about four
per cent.

CHARLES E. ATWOOD, a witness called on behalf 477
of respondents, was duly sworn.

(A discussion took place as to what Mr. Atwood would testify.)

The Court: I should be willing to admit, for the purposes of argument, that Miss Read's discovery was monumental, and has spread the world over; it would not influence my mind a bit.

Mr. Wemple: That is all right, I will excuse you, Mr. Atwood, and not ask any questions.

Ernest E. Smith.

478 ERNEST E. SMITH, a witness called on behalf of the respondents, being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. WEMPLE:

Q. Your profession is that of a chemist, Doctor?

A. A physician and chemist.

Q. How long have you practiced your profession?

A. Since 1888.

479 Q. In what particular field or fields? A. In the field of biological and physiological chemistry especially, and in the field of general chemistry, including also microscopical examinations, and work of that kind.

Q. I ask if you examined under the microscope at my request, a portion of the collodial Prussian blue which was referred to by a preceding witness as held in suspension in water? A. I did.

Q. What kind of a microscope did you use, and what method of preparation did you use in starting your examination? A. I made a solution of this Prussian blue.

480 Q. By solution you mean what, is it soluble? A. I made a solution, not in the strict scientific sense, but in the common acceptation of the term, that is mixed it with water.

Q. Under what conditions? A. I added water to the Prussian blue.

Q. Did you apply heat? A. That gives the appearance of—pardon me.

Q. Did you apply heat? A. No, this was made without the application of heat. That gives the appearance of a solution. It is not a true solution, it is a suspension, a collodial suspension.

Q. What did you do with that? A. I took that solution and examined it under the microscope, to

see whether the particles were in suspension and whether I could determine the size of the particles. 481

Q. Was this solution, as you call it, homogeneous, to the eye? A. It was. It was a clear mixture of the pigment with the water, and it looked like a true solution.

Q. Do you know under how many powers of magnification you examined the solution? A. About one-thousand powers of magnification.

Q. Did you find any particles of Prussian blue by your examination? A. I found that the Prussian blue in solution, that the Prussian blue particles, were so minute that they were not visible to the microscope under this magnification. 482

Q. Was there any portion of the Prussian blue in solution visible under the microscope? A. I saw some very small flakes that had not disintegrated by the time I made the examination, flakes smaller than one-eight thousandths of an inch in diameter, but those were just two or three of those little flakes in an extensive examination.

Q. Are you able to state whether those flakes were aggregations of the ultimate particles of the Prussian blue? A. I know they were; I know they were portions that would eventually pass into solution. 483

Q. Technically known as floccules? A. Into suspension; pardon me?

Q. Technically known as floccules? A. You might speak of them as floccules.

Q. Are you able, basing your answer on your knowledge and experience with the microscope, Doctor, to say whether the ultimate particles of this collodial Prussian blue are visible under the microscope? A. Under the ordinary compound microscope they are not visible.

Ernest E. Smith.

484 Q. Do you know of any sort of microscope under which they become visible? A. I am not sure if they would become visible under any microscope.

CROSS-EXAMINATION BY MR. CHOATE:

Q. Doctor, if such particles are invisible under the compound microscope, they can only become visible by being combined into groups of particles? A. That is true.

485 Q. So that, as long as they are properly separated from each other they remain invisible to the human eye by any means known to science? A. As far as I know.

Q. Your liquid which you were examining, was not a solution at all, but a liquid in which these particles were held in suspension? A. That is correct.

Q. And how were the particles separated from each other in this liquid, merely by shaking it up? A. Simply by agitation.

Q. As they went in, they were in what form? A. The form of powder.

486 Q. The form of powder; and of course, as they went in, they adhered to each other in considerable and visible groups; the powder itself was not invisible, I take it? A. Oh, the powder was visible.

Q. And how far separated they were in the liquid depended upon how thorough your agitation was? A. Not altogether.

Q. That doesn't help us out; how far did it depend? A. It depended also upon allowing the liquid to stand, so that any particles that were heavier would settle out.

Q. And as a matter of fact, you cannot be sure that no two particles, no two of these ultimate particles, adhered to each other in the liquid, can you? A. No.

Ernest E. Smith.

Q. Or that no twenty of them adhered to each other? A. No. 487

Q. Or that no 200 of them adhered to each other? A. No.

Q. In fact, you cannot be sure that there were not large groups of particles somewhere in this liquid that were not visible to the naked eye, that were easily visible to the microscope? A. All I can be sure of is that they were not particles that were visible with the aid of a compound microscope magnifying 1,000 diameters, except as stated.

Q. Well, your examination with the compound microscope did not cover the whole liquids, did it? A. It covered a representative portion. 488

Q. Yes, but these particles might have escaped the representative portions which you examined?

A. No, I think not, for the reason that I held the liquid up to the light and allowed a ray of light to pass through a pin hole, so that I could examine the whole of this liquid, and there was no evidence of any cloudiness in the liquid at all, by means of this examination, and I was able to exclude in a general emulsion the particles such as you refer to by that proceeding.

Q. Then you want to change your former testimony, and say that you did examine the whole of the liquid? A. Not under the microscope. 489

Q. I mean, under the microscope? A. I was explaining that I examined the whole of the liquid as to its turbidity in front of a hole, through which a ray of light was allowed to pass.

Q. But that examination was not by microscope? A. That was not by microscope.

Q. So that the microscopical examination covered only parts of the liquid? A. The microscopical examination covered only the representative parts.

Q. But anything that would escape the naked

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490 eye would escape the rest of your examination, although that covered the whole? A. Well, the part that I used was representative of the whole.

Q. I understand that, but the microscopical examination covered merely representative parts, and not the whole? A. Not the whole.

Q. Doctor, how did you know the Prussian blue you used was colloidal? A. Because of the fact that it gave this apparent solution, this fine suspension, so that I could not see the particles under the naked eye, or under the microscope.

491 Q. What is the difference between a suspension and a true solution? A. When we have a true solution, there are certain physical properties changed; for example, there is a depression of the freezing point.

Q. I mean merely the difference in regard to the fineness with which the substance dissolved is distributed among the parts of the solution. In a true solution there are no real particles left, are there? A. Oh, yes.

Q. I mean, they are of molecular size, are they not? A. They are probably smaller in a true solution than in a colloidal solution.

492 The Court: A solution implies a chemical union, does it not?

A. I don't think that I can say that it does.

Q. Are you familiar with soluble indigo? A. Yes.

Q. That forms a true solution, does it not, when dissolved in water, when placed in water? A. I believe it does; I have never tested it.

Q. How about soluble Prussian blue, such as is used in the laundry? A. I think that that is colloidal.

Q. You don't think it is really soluble? A. I don't think it is really soluble.

Joseph A. Deghueue.

Q. You think that is substantially what you used, 493
then, in your test? A. That is my impression.

Mr. Wemple: That is my case, sir. I rest.

The Court: Is there any rebuttal?

Mr. Choate: I have a couple of questions that
really ought to have been asked before. I don't
think I have any real rebuttal. I will ask
Dr. Deghueue to take the stand for a moment.

JOSEPH A. DEGHUEE, recalled by the complain-
ants in rebuttal.

DIRECT-EXAMINATION BY MR. CHOATE:

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Q. Doctor, I neglected to ask you, when you
were on the stand before, in parts to the million,
how much the total mineral impurity which you
found in the Government standard teas and in the
Q. U. I. teas amounted to for the purposes of com-
parison? A. The difference between the mineral
impurities between the Q. U. I. samples and the
government samples, determined as I outlined when
I was on the stand before, was (referring to note
book) between 700 and 1700 parts per million.

Q. That is, one had 1700 parts per million and
the other 700 parts per million? A. No, that is
the difference. I can give you the exact figures. 495

Q. I would like the exact figures? A. The stand-
ard No. 5 contained at least 2,873 parts per million
of mineral matter not derived from the tea leaf;
standard No. 6 contained at least 1,883 parts per
million of mineral matter not derived from the tea
leaf; Q. U. I. No. 5 contained 934 parts per mil-
lion not derived from the tea leaf; Q. U. I. No. 6
contained 1,000 parts per million not derived from
the tea leaf; and Q. U. I. No. 7, 1,117 parts per
million not derived from the tea leaf.

Q. Very good; that is what I wanted. As I

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496 understand, this is only the mineral impurity, mineral foreign matter? A. Mineral foreign matter.

Q. And there may have been in both cases tested other foreign matter which was not mineral? A. There may have been alleged foreign matter not determined by that examination.

Q. Did you examine the Government standards to determine whether they contained organic foreign matter in additional to the mineral matter? A. I did.

497 Q. What did you discover? A. I made a bacteriological, at least it was done for me, a bacteriological examination by plating out some of the tea leaf on petri dishes, and the usual way of counting bacteria, and allowing them to grow and showing the colonies.

Q. While we are speaking on the subject of parts to the million, did you prepare a little exhibit to show what parts to the million really mean, in the shape of two jars? A. Well, I prepared two jars showing the relative amount of color in tea, in the Q. U. I. sample and the Government standard.

498 Q. Will you produce them? A. (Producing jars) This jar contains half a pound of tea (indicating); and this jar contains one-fortieth of a milligram of Prussian blue (indicating).

Q. And what is the proportion between those two? A. About one part in a million.

Mr. Choate: One part in a million; show them to his Honor. (Jars handed to the Court). I will offer those in evidence.

Jar containing tea marked Complainant's Exhibit 7, and jar containing Prussian blue marked Complainant's Exhibit 8.

Q. Doctor, one of the witnesses for the defendants has testified that he compared the gross ash

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of one tea with the gross ash of another; will you 499
state whether in your opinion such a comparison
offers any indication whatever of the comparative
amount of foreign matter present in either of the
teas so examined? A. It does not, unless the gross
ash varies extremely widely or unless the gross ash
is beyond the ash which is ever found in a pure tea,
and the ashes of pure teas vary several per cent.

Q. That is, from what per cent to what per cent
do the ashes of pure tea vary? A. I would not
want to say.

Q. Approximately? A. (Continuing) Abso-
lutely, from memory; but they will run approx-
imately between 3 and 6 per cent; I would not want 500
to place those as absolute limits.

Q. And when you take the total ash, when you
reduce the whole of it to ash, you reduce all the
impurities to ash with it, all the so-called impur-
ities to ash with it? A. Everything is reduced to
ash which is present in the sample, impurities and
tea together.

Q. There has been testimony to the effect that
these ashes contain a number of different chemical
substances, silica, phosphorus, sulphate radicals,
iron, calcium, magnesium; are these substances
normal constituents of the tea leaf, the natural
pure tea leaf? A. They are; they are normally 501
constituents of practically every vegetable ma-
terial.

Q. So if you made such an examination of a
turnip, you would probably find exactly these con-
stituents, among others? A. Not only probably,
but you certainly would.

CROSS-EXAMINATION BY MR. WEMPLE:

Q. If two teas were reduced to ash, Doctor, and
exhibited no greater variation in the total ash
than would be normal in pure teas, you would not
be able from that information, would you, to make

Joseph A. Deghucc.

502 any inference regarding the purity of the two? A. Why, no, certainly not.

Q. Why not? A. Because by the hypothesis made in your question, the variation between the two teas is within the law of normal limits of the ash of pure teas; consequently, you could not draw any conclusion whatever from that information alone.

Q. You mean that from that information you would not necessarily conclude that one tea was as clean as the other? A. Why, no.

503 Q. Now why not? A. For the reason that if you took a tea which in its pure state contained, say, 4 per cent of ash, and added 1 per cent of sand to it, the ash would be increased one per cent approximately, and if you did not know what the original ash of that tea was and you simply ashed the tea and found 5 per cent of ash, you would say, "Why, that is a normal ash", and you would not know that there was one per cent of sand there from that determination alone; that wouldn't tell you anything unless you knew the original per cent of ash in that particular pure tea.

504 Q. I am not speaking now of percentages; I am just speaking of empirical quantities. Let us take U. I. No. 5, and the Government's standard No. 6; take 4 ounces of each, if you please, and reduce them both to ash. Now supposing that you find in the total ash that one of the two teas has an ash 5 per cent. heavier than the other, that would be a normal condition which might be expected if the teas were pure, would it not? A. It might be, yes, if they are both within the limits.

Q. Both within what limits? A. Within the limits of ashes of pure teas.

Q. I have not said anything about any limits.

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A. Well, you have not given me anything to guide me, then, in answering the question. 505

Q. You mean if the tea which you reduced to ash shows a certain normal percentage of ash, that will indicate that it is a pure tea? A. So far as that determination alone is concerned, it would, yes, if you had no other information regarding the tea.

Q. In other words, it shows, doesn't it, that everything that is impure about the sample, or volatile, has passed off? A. Why no, certainly not. The pure leaf of that tea may contain half or one or two per cent. less ash than that, and the rest of the ash may be impurity; in fact, the determinations which I made on the tea show that very plainly. The total ash is within the limits, in all these teas, is within the limits of pure tea. Nevertheless, there is impurity in all of them, varying amounts of it. 506

Q. That is true both of the Government standards and the imported teas, is it not? A. That is true of all of them.

Q. Yes. Then we start with the proposition that all of the teas are within the normal ash of pure teas? A. Yes, to be sure.

Q. Now then, will you explain to us why your ash determination here tells something about the purity of the tea, but the ash determination, with the percentages, made by another witness, tell nothing? A. Because we used different methods. I didn't ash the tea directly; I first separated the mineral impurities from the tea leaf, by shaking with carbon tetra chloride. The mineral impurities being heavy, settled to the bottom. 507

Q. You told us that you separated some impurities in that manner? A. Yes, the mineral impurities would separate in that manner by crush-

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508 ing the tea leaf very fine and then shaking with carbon tetra chloride and centrifuging. In that way the heavy mineral matter settled to the bottom, and the light leaf, the true tea leaf, containing its natural mineral matter, combined with the vegetable matter of the leaf, remained floating. The sediment was separated and dried and weighed, and ashed.

Q. Precisely. A. That gave the mineral matter in that sediment. I also took some of the leaf which floated, of that identical sample of tea, and dried that, and determined the normal ash of the
509 leaf in that identical tea leaf, from which the sediment had come. I then could correct for any possible tea leaf which had gone into the sediment, dead tea leaf, charred tea leaf. Even by assuming that all that sediment might have been tea leaf, I deducted a normal amount of tea ash on a particular sample from which this sediment had come, from the total ash of that sediment, and what was left was positively foreign matter to that tea. It couldn't be anything else.

Q. It was foreign matter that fire would not consume, wasn't it? A. It was foreign mineral matter.

510 Q. Yes? A. But I examined under the microscope also, to—

Q. So far as your ash analysis goes, isn't it true that no matter how much consumable foreign matter this tea has in it, it would not appear or be determined by your ash results? A. I so testified on my direct-examination. I said that there was organic impurity present which was not determined by this method.

Q. You testified, I believe, that you found some bacteriological reactions, if you call them that, in examining the Government standards? A. Yes.

Joseph A. Deghuee.

Q. You don't know how those bacteriological signs got there, do you? A. No; I can surmise how they got there. 511

Q. No, I am not asking for that. A. No, I don't know positively; I didn't see them get there.

Q. Was the tea exposed to the atmosphere at any time before you examined it, while it was in your charge? A. I cannot say that from absolute observation, but I know that in the way tea is handled it must have been exposed to the air at some time previous to the time I received it.

Q. It might have been exposed to the air in your laboratory, might it not? A. This was a sealed package, the Government sealed packages of standard teas. 512

REDIRECT-EXAMINATION BY MR. CHOATE:

Q. Have you made a special study of the chemical knowledge of the day with reference to what substances are and what substances are not harmful? A. Yes, I have.

The Court: What is there in your bill about that?

Mr. Choate: This, your Honor; there is nothing definitely in the bill, but what I am anticipating is this, that the other side will argue that they have a right, the Secretary of the Treasury has a right to make one form of impurity more important than another, because perhaps it is harmful, because it is not shown to be harmless. They are going to argue that we are bound to assume that the Secretary of the Treasury has found it harmful, or something of that kind; and therefore it may be considered more important than all these other impurities that are disregarded. If your Honor is going to hold that that is not possible, I will be charmed to leave it out. 513

314

The Court: I am prepared to hold now that as a matter of fact, I have no more specific explanation now than I had when you opened this case, as to the actual harmfulness of Prussian blue or ultramarine or indigo; that therefore I make no finding whatever as to the results on the human frame of the consumption of quantities, small or large, of either of those substances, except that I maintain that as matter of common knowledge, now that I know that the marking part of a blue pencil is Prussian blue, minute quantities of blue pencil do not kill.

515

Mr. Choate: I am a little puzzled at your Honor saying that you have no more information, when we have offered testimony of distinguished chemists to that effect.

516

The Court: When I use the expression information, I mean I have no more evidence upon which I should feel myself justified in making a definite finding. I will go further, however; I shall undoubtedly hold in this case, as I have held in other cases, that unless the subject of what is impure is not entrusted directly to the board by Congress, I shall decline jurisdiction on that question. I decline to receive any further evidence on the subject of the opinions of witnesses as to the physiological effect of Prussian blue or other coloring matters that have been mentioned here, upon the human frame; and to that each party can take an exception.

Mr. Choate: Well, I suppose that that will involve an assumption on your Honor's part, when he comes to consider the case, that the coloring matters are actually harmless; other-

William Dallas.

wise I shall suppose that your Honor will feel 517
obliged to receive proof.

The Court: Perhaps it amounts to that, because as I have said as to the only coloring matter that has been seriously mentioned here, that is Prussian blue, it is a matter of common knowledge that it is not poison anyhow, for every man in this room has eaten it. But as to whether it has or has not or may not have or may not be possessed at some time in the future of a slight deleterious effect upon the human frame, I don't know. I shall decline to make any finding. And furthermore, I am 518
of the opinion that the finding, if made, would be immaterial.

Mr. Choate: I am satisfied with my exception to your Honor's ruling there, if I am allowed it.

WILLIAM DALLAS, recalled by the complainants in rebuttal.

DIRECT-EXAMINATION BY MR. CHOATE:

Q. Mr. Dallas, you have been familiar all the time you have been in the tea business with the kind of teas that have been coming into this 519
country? A. Yes, sir.

Q. And do you know, as a matter of fact, whether prior to 1911, any uncolored green teas came into this country? A. I do not, no, sir.

Q. You don't know whether they did or not? A. They did not.

Q. No uncolored green teas came in? A. No uncolored country green teas, or uncolored Ping Suey teas, or any other China country or Hoo Chow teas, or any other China green tea, came in here uncolored, no, sir.

William Dallas.

520 Q. Prior to 1911, was any examination made for color? A. Yes, sir.

Q. That was done by means of the cup test? A. Cup test.

Q. And were there prior to 1911 any rejections of teas for excessive color? A. Yes, sir.

By the Court:

Q. Mr. Dallas, counsel will not object to my question about it; how does the usage of the trade ascertain whether tea is fit for consumption; you have had forty years experience? A. Yes, sir; by the cup test.

521 Q. By the cup test; you mean, making a cup of tea? A. Exactly, yes, sir.

Q. Will the cup test show the presence of coloring matter in minute or small quantities? A. It positively will, yes, sir.

Q. It will; then it would be possible to ascertain by the cup test whether there is any Prussian blue at all in the tea? A. It is, unquestionably.

Q. Even as small a quantity as you have heard discussed in this room, for I observe you have been here during the taking of this evidence? A. It positively will.

522 Q. Then the presence of coloring matters in tea has been, for all your long experience, well known to the trade? A. It has.

Q. And it has not apparently been considered something that rendered tea unfit for consumption? A. It has not, your Honor. I have tasted as much tea as any man living; I have never been a minute sick in my life.

Q. Has there been any change in the usages of the tea trade since 1911? A. There has not.

Q. Is it not true that tea which formerly, prior to 1911, came into the United States without let or

William Dallas.

hindrance, has since 1911 been refused admittance 523
solely on the ground of coloring matter, or isn't
that the truth? A. That is true.

Q. But the usages of the tea trade did not
change? A. They did not.

Q. What changed? A. The administration
changed; the parties administering the law
changed.

By Mr. Choate:

Q. Mr. Dallas, when you say that even small
proportions of color in tea can be detected by the
cup test, do you mean to go so far as to say that 524
you could see Prussian blue in the cup if there were
only one part in a million in the tea? A. You
can see color in the cup, in the scum, after a certain
period; if you let your cup stand, with the liquor
still in the cup over the leaves, if there is any
coloring matter it comes right up in the scum.

Q. As a matter of fact, aren't you assuming, Mr.
Dallas, that when you don't see any color in the
scum there is no color in the tea? A. Exactly.

Q. You have not examined teas that you have
found by the cup test to be free from color, to find
out whether they contain these microscopic quan-
tities, have you? A. With a microscope? 525

Q. Yes. A. No, sir.

CROSS-EXAMINATION BY MR. WEMPLE:

Q. Then you cannot say, can you, Mr. Dallas,
that because you did not find any color in the cup
there wasn't any there?

Mr. Choate: Of course he can't, I concede
that. He means it is a practical test.

William Dallas.

526 By Mr. Choate:

Q. The upshot of what you mean, Mr. Dallas, I take it, is this; correct me if I am wrong; with the cup test you can tell a colored tea from an uncolored tea? A. Exactly.

Q. But if small specks happen to get in by mistake or accident, you might miss them? A. Might miss them.

By Mr. Wemple:

Q. You don't mean us to understand that the way in which the blue stuff gets in the tea has anything to do with the cup's discovering it, do you, Mr. Dallas? A. The way what?

Q. Whether it gets there by accident or by intent hasn't anything to do with the ability to discover it in the cup? A. Well, it wouldn't show in the cup because it is accidental.

Q. Then you say, if it is accidental, it will not show in the cup? A. It is not on the leaf at all, it is accidental; we don't sift the leaf to find the dust.

Q. Is it in the tea if it is accidental? A. What?

Q. Is it in the tea if it is accidental? A. In the tea? It certainly is not; it is in the dust.

528 Q. Then if coloring matter is accidental, it is only in the dust? A. It is in the dust.

Q. Is this dust located all in one part of the package? A. Not necessarily, no, sir.

Q. It is scattered through the tea, isn't it? A. Well, the great bulk of it gets in the bottom of the package.

Q. It is scattered through the tea, is it not? A. More or less.

Q. Then when you take a handful of leaves out of a canister and put them in a cup, you get some dust, don't you? A. Very little. You could hardly

William Dallas.

get the dust if you picked the leaf out and put 529
it in the cup.

By the Court:

Q. Mr. Dallas, I understood you to say, and I think you stick to it, that if the coloring matter gets in the cup, you can find it? A. Exactly.

Q. Because you have tea and dust in the cup, would it matter; if you have dust in the cup and there was coloring matter in the dust, you could find it in the cup? A. Certainly, yes, sir; it is a very difficult thing, your Honor, for a tea tester who has been at it for a long time to explain to parties who do not understand it, what you do 530
find or how you do find it.

By Mr. Wemple:

Q. Then how many men like you are there, Mr. Dallas, in this country who can take a cup of tea and tell, no matter how small an amount of blue there is in it? A. There are quite a number, I should fancy.

Q. Could you name us one? A. Sir?

Q. Could you name us a man who claims the same power that you do on that subject? A. I don't claim anything special, Mr. Wemple.

Q. I am asking you a simple question? A. I 531
simply claim that through experience I can tell a good deal about tea that one without experience can't.

Q. Yes, but I understood you to say that no matter how small the quantity of Prussian blue in tea, you can take a cup of that tea and decide whether it is there or not? A. I didn't specify Prussian blue; I said color.

Q. Well, let me specify Prussian blue; that would be included in color, wouldn't it? A. Not necessarily, no.

Q. You mean that Prussian blue is not included

William Dallas.

532 in your definition of coloring matter for tea? A. Oh, yes, of course it is; so is indigo.

Q. Now, can you take a tea that has got a very small amount of Prussian blue in it, and put it in a cup, and when you have drawn the tea tell whether Prussian blue is there or not? A. Well, I couldn't specify what it was, no.

Q. No, but you can tell there is blue coloring matter there? A. If the color is in the tea I could tell it, yes, sir.

Q. No matter how small the quantity? A. No, I wouldn't say how small the quantity, no.

533 Q. You wouldn't say that? A. No, because as a rule we don't draw dust when we draw tea; we draw leaf.

Q. I didn't say anything about the dust or the leaf, Mr. Dallas? A. I know, but the custom is to draw leaves, it is not the custom to draw dust; it is the custom to draw leaf.

Q. The question is whether, no matter how small the quantity of blue in the tea, you can detect it in the cup, assuming that it gets there; what is your answer on that? A. Well, it might be so infinitesimal that no living man could find it.

534 Q. Well, now, we are talking about you? A. Exactly.

Q. I thought you said a while ago that you could infallibly tell in the cup whether there was any coloring matter present or not? A. I am talking of ordinary coloring of teas; I am not talking about any infinitesimal coloring.

Q. You are talking about a substantial amount of coloring matter in teas? A. No, the ordinary coloring of tea.

Q. The ordinary? A. Yes, exactly; that is used for other countries.

Q. What is the ordinary coloring matter, the

Charles E. Atwood.

ordinary amount, I mean? A. Well, I never put 535
it down in grams or grains, or anything like that.

REDIRECT-EXAMINATION BY MR. CHOATE:

Q. You are talking about the sort of quantity
that can be used to improve the appearance of teas,
is that it? A. Exactly.

Q. Mr. Dallas, some question was made about
the lens used for making the Read test; have Car-
ter, Macy & Company supplied themselves with
such lenses for use in the Read test? A. They have.

CHARLES E. ATWOOD, recalled by the respondents 536
in surrebuttal.

DIRECT-EXAMINATION BY MR. WEMPLE:

Q. Have you an extensive experience in testing
teas by the cup infusion, Mr. Atwood? A. I have.

Q. How extensive? A. In business since 1882.

Q. What firm are you with at the present time?
A. J. C. Whitney & Company.

Q. In Chicago? A. In Chicago, New York, Bos-
ton.

Q. Over what period of years have you been in
the habit of making the cup test on teas? A. Ever
since the establishment of the tea law. 537

Q. Are you able, by means of the cup test, to
determine whether a given tea has any coloring
matter in it or not?

Mr. Choate: I object to that on the ground
that it is immaterial whether this witness is or
not.

The Court: I will allow it.

Mr. Choate: Your Honor will note my ex-
ception.

The Witness: It depends altogether on the
amount.

Q. Well, what circumstance connected with the

Charles E. Atwood.

538 amount governs your ability, large or small? A. Large amount, sufficient coloring to entirely face the leaf.

Q. Are many teas made and imported into this country which have some coloring matter, but not that much? A. Since 1910 the color has been gradually diminished, according to the Government's standard.

539 Q. Well, prior to that time? A. It was selected, until color was entirely eliminated or practically so, color could be discerned on the top of the cup, but it was of sufficient quantity so that it could be easily discerned; in fact, the test was to blow the scum up to the side of the cup, so large was the quantity; and that was discerned and the tea was rejected or accepted whether or not it had this quantity of scum on the top. But since 1911, in 1911 the amount was reduced, and it became harder for an ordinary man to discern it, and since that time I should say absolutely it is absolutely impossible.

CROSS-EXAMINATION BY MR. CHOATE:

Q. Mr. Atwood, when did you first begin dealing in green teas? A. In what?

540 Q. Green teas? A. Always we have dealt in— May I ask what green teas do you mean?

Q. I mean, when I say green teas, in China green teas? A. There are Japan green teas, also.

Q. China green teas, I mean? A. Ever since we have been in business.

Q. You are a member of the firm of J. C. Whitney & Company? A. Yes, sir.

Q. Had you imported any green teas prior to 1911? A. Yes, sir.

Q. Can you say what quantity you imported in 1910, or in any year prior to 1911? A. Oh, only roughly.

Charles E. Atwood.

Q. State the greatest quantity, roughly, the greatest quantity you ever imported before 1911? 541

A. Of China green tea?

Q. Yes, including the country green, Ping Sueys, and any other kind? A. 2,000,000 pounds.

Q. In any one year prior to 1911? That is, the firm of J. C. Whitney & Company did? A. Yes, sir.

Q. What year was that? A. Some year, any of the years prior to that.

Q. What year was it? A. Well, I have no records with me; I should say 1909 and 1910.

Q. How long is it since you have been in China?

A. I was there in 1912.

542

Q. In Shanghai? A. Yes, sir.

Q. Buying? A. Overseeing, naturally.

Mr. Wemple: I have one thing, and that is a deposition, direct and cross-interrogatories, which was procured from a witness when he was leaving the country. I suppose it is hardly necessary to read it question and answer into the record?

Mr. Choate: Except for the objections, I think almost all of it is objectionable.

The Court: You can file it, subject to objections which are noted in the record; are they noted? 543

Mr. Choate: They are not noted there, no.

Mr. Wemple: They are not noted.

The Court: You may note on the margin of the original, Mr. Choate, your objections, very briefly. Let the document be sent to my chambers this afternoon, if convenient to you, with those objections, and I will in writing pass upon them; and of course either party may be deemed to have an exception, according as I agree with the other.

NEW YORK, June 5, 1914.

544

Mr. Choate argued on behalf of the Complainants.

Mr. Choate: Before I began, I should have asked leave to insert in the record a concession of two facts which have a bearing here, and which Mr. Wemple agrees to concede as facts, although he does not concede them as material.

Mr. Wemple: That is right.

Mr. Choate: One is that the Read test was invented only in 1912, I think?

Mr. Wemple: In this country; I understand it was used in Japan before.

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Mr. Choate: In this country and was theretofore unknown to the tea trade or anybody else in this country, and that no examination or test was known to the tea trade other than the cup test as described by Mr. Dallas, and the prior examination of the dry leaf.

Mr. Wemple: There was chemical analysis known before that.

Mr. Choate: Well, known to the tea trade?

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Mr. Wemple: Why necessarily, if it was tea, I suppose. Why not simply concede that the Read test, and nothing of that character, was used in the trade before the invention of this particular device?

Mr. Choate: Then I will accept the concession as outlined by Mr. Wemple, the statement to the effect that no form of examination or test was known to the tea trade, prior to the introduction of the Read test, except the cup test as described by Mr. Dallas and other witnesses, and the visual examination of the dry leaf.

Mr. Choate resumed his argument in behalf of the Complainants.

Mr. Wemple argued on behalf of the Respondents.

Edward Jerome Hazen.

DEPOSITION OF EDWARD J. HAZEN, A 547
WITNESS ON BEHALF OF THE RE-
SPONDENTS.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } ss.
Eastern Division. }

The DEPOSITION of EDWARD J. HAZEN, taken on behalf of the Respondents, in a certain cause pending in the District Court of the United States for the Southern District of New York, wherein George H. Macy and others are Complainants, and George Stewart Brown and others are Respondents, before THOMAS C. MACMILLAN, Esq., Clerk of the District Court of the United States for the Northern District of Illinois, at his office in the United States Court House, Room No. 650, Chicago, Illinois, beginning at the hour of 10:30 o'clock A. M., on Wednesday, April 22, 1914, pursuant to the attached notice. 548

APPEARANCES:

HENRY W. FREEMAN, Esq.,

Appearing for the Respondents.

No one appearing for the Complainants.

EDWARD JEROME HAZEN, a witness of lawful age, 549
produced on behalf of the Respondents, having been first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT-EXAMINATION BY MR. FREEMAN:

Q. Give your full name, please, Mr. Hazen. A. Edward Jerome Hazen.

Q. Where do you reside? A. That is the hardest question you can ask me. I spend six months of my time in China, and probably three and one-half months in America.

Edward Jerome Hazen.

550 Q. What firm or concern are you connected with?
A. J. C. Whitney Company.

Q. Where is their principal office? A. Chicago.

Q. And their business is what? A. Tea importers.

Q. How long have you been connected with that concern, Mr. Hazen? A. Eight years.

Q. Were you in the business prior to that time?
A. Since 1886.

Q. Now just state—— A. I hate to tell that because it shows how old I am.

Q. Just state, will you, briefly, what experience you have had as a buyer and handler of teas. A.
551 Well, I have had seven years' experience in Shanghai.

Q. In Shanghai. A. As a buyer, yes.

Q. Are those the past seven years? A. Yes.

Q. During that seven years, can you approximate the amount of teas that you have bought in the Shanghai market? A. Oh, I could give you in the last—let's see; I could probably give the last three years. Oh, you mean in the entire eight years—seven years?

Q. Yes. A. No, I could not tell you.

Q. Or in the last three years. A. Yes.

552 Q. Just approximately. A. What do you want it in, in pounds or packages or dollars and cents, or what? I can give it to you in dollars and cents, if you like.

Q. Well, give it to us that way. Oh, I don't mean exactly. A. Well, between \$600,000 and \$700,000 worth of tea every year for the last three years.

Q. That is, six to seven hundred thousand dollars' worth a year? A. Yes.

Q. Yes. And during that period of time you

Edward Jerome Hazen.

have spent six months of each year in China? A. 553
In Shanghai, yes.

Q. In Shanghai, China, yes. Do you know the other American buyers there? A. Yes.

Q. Who are they? A. You want to know—

Q. What other American buyers are there in Shanghai? A. There is Mr. Quackenbush and Mr. Saunders. You mean American buyers?

Q. Buyers for American— A. And houses?

Q. Yes, for American houses. A. Oh. Do you want the firms or the buyers themselves?

Q. Well, the firms, and then if you can give the buyers for the particular firms. A. I will begin, then, with Carter, Macy & Company; they call themselves in China George H. Macy; and their buyers are Mr. Quackenbush and Mr. Saunders. And Wisner & Company. That is not an American house. That is an English house, but they do business in the United States. 554

Q. They do business in the United States, yes. A. Mr. Lambe is the buyer. Alexander Campbell & Company; buyer is R. E. Wilson; that is an English house. Dodwell & Company; the buyer is R. G. McDonald. Westphal, King & Ramsey; the buyer is Mr. Gilson; I don't know his initials. Reed, Evans & Company; the buyer is Mr. Craven. 555 Robert Anderson & Company; the buyer is Mr. White. I don't know whether you would give Brandenstein also—well, yes; M. J. Brandenstein.

Q. Brandenstein? A. Brandenstein; the buyer is Mr. Flatow.

Q. Are those the principal ones? A. Yes, those are the big ones and the little ones and all together.

Q. Yes. I think that will do. A. And ourselves, of course.

Q. Yes. A. I forgot that. I forgot our own house. That would never do.

Edward Jerome Hazen.

- 556 Objected to as immaterial and irrelevant; customs in Shanghai are not in issue.
J. H. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

- 557 Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. E. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

- 558 Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Q. Will you tell in outline the methods that are employed there in the purchase of tea; how is tea bought in the Shanghai market? A. That will fill up about fourteen books like that (indicating reporter's note book).

Q. I have some references to tests as made. A. I will give it to you in a very simplified form.

Q. Yes. A. The samples are shown to us by native brokers. We value these samples as they are brought in. The value is arrived at by comparison, or what we think the tea is worth in the United States to us, we will say. In arriving at the values, we draw the tea, put water on it.

Q. Is that known as the cup test? A. Yes. We do that for quality and character; and we examine the leaf for the appearance and make. Then when we buy the tea, we have what we call chest musters sent to us by the tea men.

Q. What is a chest muster? A. It is a package of each line that we have bought; and before doing anything further with it we use the Read test on it.

Q. Re-a-d? A. Yes. Read test, just exactly the same as the inspector does it at the ports here.

Q. The Read tests, will you state whether or not it is identical with the test embodied— A. Following out the instructions in this Treasury Department—(indicating).

Q. Circular? A. Whatever it is, I don't know. You can put that in (referring to circular).

Q. Well, it is identical with the tests employed by the— A. Government, government inspector.

Q. Yes, by the government inspectors. A. We employ the Read test, and if the tea is found without color, we settle the tea in sugar.

Q. You mean by settle— A. Finally buy it.

Q. Finally buy it? A. Yes.

Edward Jerome Hazen.

Q. And the term "chop" is applied to what? A. An invoice.

Q. Now, with more particular reference to this Read test,—when is that test applied in the purchase of the tea? A. I always apply it to the chest muster sample.

Q. Do you apply the test yourself; are you familiar with the method of application? A. Yes.

Q. Of that test? A. Yes; word for word as it is in the instructions (referring to circular heretofore referred to).

Q. That is, in the instructions of the Treasury Department? A. Treasury Department, yes.

Q. Relative to the test to be applied to tea offered for importation into the United States? A. Yes, sir.

Q. And what is the purpose of that Read test; to what is that particularly directed? A. To uncover color.

Q. That is, by color you mean—— A. Coloring matter the Chinese put in the tea, if they should put in any.

Q. Do you refer to natural or artificial? A. Artificial coloring.

Q. What is the purpose of artificial color in tea? A. To improve the looks of it; improve the appearance of it.

Q. What are the usual teas purchased now in Shanghai the past three years, for importation into the United States? A. I did not hear the first part of it.

Q. I say, what are the usual—the ordinary teas that are purchased there now? A. Hoochows, Pingsueys, country tea and Congou.

Q. Are there any teas there known as green teas? A. Pingsueys, Hoochows and country teas are the green.

Q. What do those terms designate; what is the

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Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

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Same objection; same as to customs in Shanghai, etc.
J. H. C., Jr.

Objected to as immaterial and irrelevant.
J. H. C., Jr.

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Objected to as immaterial and irrelevant.
J. H. C., Jr.

Edward Jerome Hazen.

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difference in the teas designated under those terms?
A. They come from different districts; there are different kinds of teas.

Q. The designation, then, refers to the class of teas produced in different districts? A. Yes, the different kinds of tea.

Q. Are those the same teas that have been imported from Shanghai for the past six or eight years? A. Yes.

Q. Prior to this Read test? A. Yes.

Objected to as irrelevant and immaterial.
J. H. C., Jr.

Q. What effect, if any, has the adoption of the Read test had upon the classes of tea imported into the United States from Shanghai? A. Well, it has eliminated some very inferior teas.

563

Same objection.
J. H. C., Jr.

Q. Such as what? A. Shanghai packed teas,—teas made in Shanghai, of very poor leaf, very poor quality of leaf. They cannot be colored; therefore, they cannot look well enough without color,—they do not look well enough without color.

Q. Well, the Read test is directed against color, is it not? A. Yes, entirely.

Objected to as irrelevant and immaterial.
J. H. C., Jr.

Q. Now, do I understand your answer to that question to be that it eliminated teas that cannot be colored? A. No, teas can be colored. The elimination of colored or Shanghai packed teas, Wenchows and Fytow teas the appearance of the leaf is not attractive enough without color, and in some instances they cannot be made without putting color on them. Therefore, they are eliminated from the United States under the Read test, you understand.

564

Same objection.
J. H. C., Jr.

Q. Well, the Read test, you mean that the other teas that are imported that pass the Read test are colored? A. No, no, no. If they passed the Read test, they are uncolored. It proves that they are. I think I can make that—I do not think you are very clear about it, are you?

Edward Jerome Hazen.

Q. No. I want it so, if you will state for the purpose of the record, just exactly what the effect of the application of the Read test in this country, to the examination of teas, has had upon the grades of teas and upon the kinds of teas that are imported into the United States from Shanghai.

Same objection.
J. H. C., Jr.

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A. Yes.
Q. Now, what has been that effect? A. Well, I think the Read test has eliminated these undesirable Wenchow teas, Fytows, and Shanghai packed teas.

Same objection.
J. H. C., Jr.

Q. What class of teas were those, again? A. They are called country tea, under the general head of country tea.

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Q. Wenchows, Fytows—— A. And Shanghai packed teas. Of course, there is a slight difference; of course a buyer in China makes a distinction between Shanghai packed tea and country tea, because country tea is a tea that is made in the country. Shanghai packed teas are locally packed teas; don't you see?

Q. Now, in what way has the Read test eliminated those inferior grades of teas? A. Well, there is no market for them without color, for the simple reason that they are so unattractive in appearance, without color, that we do not want them. I mean to tell you that these three kinds of tea that I have mentioned are the poor quality of leaf, defective leaf; you know what I mean.

Objected to as immaterial and irrelevant.
J. H. C., Jr.

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Q. The teas, then, to which artificial color is ordinarily applied were teas of what class, speaking as to—— A. Well, when we used color teas——

Q. That is, I mean as to whether they were of the superior or inferior grades. A. Oh, no, before the Read test was applied, when colored tea was allowed to come into the United States, they put color on all kinds of tea, good, bad and indifferent.

568 Same objection.
J. H. C., Jr.

Q. Then the application of the Read test for the detection of artificial color has resulted in the elimination of the—— A. Of the poor qualities of tea.

Objected to as immaterial and irrelevant.
J. H. C., Jr.

Q. What poor qualities of tea? A. That I have mentioned, yes. I mean the poor qualities of tea such as I mentioned, the Wenchows, Fytows and Shanghai packed teas.

Same objection.
J. H. C., Jr.

Q. With the elimination of those teas, then, those inferior grades for which there would be no market without artificial coloration, is there sufficient supply of teas to be purchased in Shanghai which will stand the Read test, for supplying the demand in this country? A. In my opinion, yes.

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Same objection.
J. H. C., Jr.

Q. Well, from your experience as a buyer there, has that been your experience? A. Yes.

Same objection.
J. H. C., Jr.

Q. That you could purchase—— A. Quite enough for our needs.

Same objection.
J. H. C., Jr.

Q. Yes. And that Read test you apply in China, before the goods are finally accepted? A. Yes, sir, always. I could go into more detail, if you would like, about the application of the Read test.

Q. I think it would be well to have in the record there, for the purposes of showing just what is done there—— A. Perhaps I had better put that in; I think I had better. For instance, in buying tea in China, I am very careful always in giving the tea a thorough test. For instance—the samples brought to us are brought in tin cans that have been used years and years and years by the Chinese. The cans that they have used to show samples of colored tea; therefore, I never apply the Read test to samples given to me by the Chinese in that way, because coloring matter will easily come off of a tin onto the leaf, you see; and I have gone so far, in many instances, of going to the package myself and drawing the tea out by hand on a clean paper

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and then examining it, you see; and I have a set of trays that I use—that I put the tea in when I apply the Read test, that I do not use for any tea that has any color in it, but keep the color from the tray, you see, protecting the tea as much as I can; and I am very particular about examining teas under the Read test.

Q. Now, how many chests of tea did you buy during the year 1913? A. I bought 51,051 boxes of Pingsuey. Out of that lot I had 109 boxes rejected for color. I bought 5,117 half-chests of Hoochow; no rejections. And I had 4,584 half-chests of country tea; my rejections were 232 half-chests out of that quantity; making a total of—I have not figured that out. Do you want me to figure that out? That would mean 60,752 packages of green tea. I can give the number of pounds in an approximate way. That is nearly 2,000,000 pounds of tea.

Q. Now, what is the average weight of a box? A. That is what I have given you; we figure 62 pounds to a package. We take, say, 51,000 boxes; that means 25,000 half-chests, weighing approximately 62 pounds, we figure.

Q. That is a half-chest is—— A. Sixty-two pounds, average.

Q. How does a half-chest and a box compare? A. Well, a box is about half as much as a half-chest. That is the way we figure in million pounds from there, I mean million pounds export. I will give the number of packages.

Q. Well, that is enough. A. That is the exact total in packages as I have given it to him there.

Q. A half-chest is approximately twice the size of—— A. Of a box.

Q. Of a box? A. Yes.

Q. What have been, commercially speaking, the

Objected to as immaterial and irrelevant.
J. H. C., Jr.

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Edward Jerome Hazen.

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results of the tea trade in Shanghai, from your experience, of the adoption of the Read test by this country? A. The Pingsuey tea men have tried very hard to meet the requirements of the United States, by refusing even to make colored tea for Canada where teas are made for the United States. Any teas wanted for Canada colored were to be made in Shanghai. The country tea men are always making teas, colored teas, for European markets,—other markets besides the United States; and I believe they do the very best they can to meet the requirements of the United States wanting teas without color.

575

Q. That is, by eliminating the—— A. By eliminating color as much as they can for teas going to the United States.

Q. This artificial color, how is that applied to tea; what is that; what are the ordinary artificial colors, and how are they applied to the tea? A. It is applied in the firing of the tea, when it is being fired.

Q. What is used ordinarily, do you know? A. I think none of us can really—we have rarely found out what it is, but my idea is it is a mixture of soapstone and Prussian blue.

576 Objected to as immaterial and irrelevant.
J. H. C., Jr.

Q. Did you have an experience there in the purchase of some particular lots, or so-called chops of tea there, within the last year or two, Mr. Hazen? A. Yes; last season I had.

Same objection.
J. H. C., Jr.

Q. That is, in 1913. A. Yes, last season.

Same objection.
J. H. C., Jr.

Q. What was that experience that you had in regard to those chops of tea? A. Well, I had the refusal of two of the choicest chops in China.

Same objection.
J. H. C., Jr.

Q. How did that come about? What are the commercial—how is that tea sold? You say you had the refusal of two chops. A. Usually if a buyer buys a chop of tea for more than one season,

he has the privilege of buying the chop the next season in preference over everybody else; and I had bought these teas myself, 1911, and I bought them again—I bought one of them in 1912, and in 1913 I bought one of them again. There were three. The reason I did not buy the other two, which I had the refusal on, and they are supposed to be the finest teas in China, was because they were, in my estimation, too much colored to pass the Read test in the United States. Therefore I refused to buy them.

Q. Do you know whether they were colored or not,—the other two chops? A. According to my tests, they were. And then, after I had said I did not want them, the tea man said that he thought I was very clever in not buying because he thought they had quite a little coloring inside, as he said himself.

Q. Now, were you familiar with the tea trade in China prior to the passage of the original Act of 1897, regarding the importation of teas? A. Yes, sir.

Q. And the fixing of standards? A. Yes, sir.

Q. What was the class of teas then being exported to the United States from China prior to 1897? I do not know that you are familiar with the conditions. In 1897 was the original Act. A. The tea law, yes. Anything was allowed to come into the United States.

Q. Well, what was the result of that, as to the class of teas? A. The enactment of that law has eliminated a lot of very undesirable teas in quality.

Q. And down to the time of the adoption of the Read test, was there any particular test made for artificial coloring? A. No, none; only for infusion.

Q. What do you mean by infusion? A. The leaf, the color of the infusion to determine its quality.

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Same objection.
J. H. C., Jr.

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Objected to as incompetent, irrelevant and immaterial.
J. H. C., Jr.

Objected to as incompetent: witness not qualified to answer.
J. H. C., Jr.

Same objection.
J. H. C., Jr.

Edward Jerome Hazen.

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Objected to as incompetent and immaterial.
J. H. C., Jr.

Same objection.
J. H. C., Jr.

Objected to as incompetent and immaterial.
J. H. C., Jr.

Same objection.
J. H. C., Jr.

Standards were selected by a board appointed by the United States Treasury Department.

Q. Well, the original Act was to elevate the character of teas exported to this country, was it not?

A. Oh, yes, yes.

Q. And since the Read test, has there been a further elimination— A. Oh, yes.

Q. —of the more undesirable grade of teas?

A. Yes.

Q. Is there anything else that you can state, Mr. Hazen, which I have not asked you, relative to the effect of the adoption of the Read test by this country, and the tea business? A. Its effect on the tea business?

581

Same objection.
J. H. C., Jr.

Q. Yes. A. Well, in my opinion, I think the Read test is a very good one for the United States. I think that it improves the quality of tea that we get in the United States.

Same objection.
J. H. C., Jr.

Q. And, from your practical experience as a buyer of teas in China, and Shanghai, for a number of years, is there any practical, substantial difficulty in buying teas that will meet and pass the Read test? A. No, I don't think so.

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Same objection; also objected to on ground that question calls for an opinion on a matter not the subject of opinion evidence.
J. H. C., Jr.

Objected to as immaterial and irrelevant.
J. H. C., Jr.

Q. That is, will care and reasonable skill in buying enable one to buy teas that will pass the Read test? A. Yes; emphatically, yes.

Q. What, in your opinion, Mr. Hazen, as a buyer of teas in Shanghai, China, for the past sixteen years, would be the effect of repeal or the lack of strict enforcement of the so-called Read test by the government of the United States, upon the commercial conditions there in China, affecting teas? A. The Chinese would put color in tea, and eventually it would be back on the basis it was before we excluded colored tea. The Chinese will take ad-

Edward Jerome Hazen.

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vantage of the smallest opportunity to be allowed to put color in tea. I believe the Chinese would start by putting a little color in tea, and if they found that went through and was shipped to the United States and had passed, the others would put a little bit more in, and there would be no end to the practice of coloring tea, until we would be back again on the basis of the seasons prior to 1911.

Q. Will you state whether or not, Mr. Hazen, the application of the Read test to imported teas by the United States creates any unusual hardship or difficulty, with reference to the purchase and handling of teas by importers? A. No, it does not.

Objected to as immaterial and irrelevant; also on ground that question calls for an opinion on a matter not a subject of opinion evidence.
J. H. C., Jr.

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Q. Will you state, Mr. Hazen, whether or not, since the adoption of the Read test by the United States, it is a matter of any serious commercial difficulty to obtain sufficient tea of good quality to meet the requirements of the United States? A. In my opinion, no.

Objected to as immaterial and irrelevant.
J. H. C., Jr.

(Signed) EDWARD J. HAZEN.

CHICAGO, ILLINOIS, April 28, 1914.

11 o'clock A. M.

585

Parties met pursuant to notice.

Present: HENRY W. FREEMAN, Esq.

Appearing for Respondents.

THOMAS C. MACMILLAN, Esq.,

Clerk of the United States District Court, Northern District of Illinois.

Mr. Freeman: I will read a letter received from counsel for complainants in this case:

Edward Jerome Hazen.

586 "EVARTS, CHOATE & SHERMAN

JOSEPH H. CHOATE,
Counsel.

Allen W. Evarts

Thomas T. Sherman

Herbert J. Bickford

Joseph H. Choate, Jr.

Cable Address Evarts, New York.

60 Wall Street, New York

Telephone 1652 John.

APRIL 29, 1914.

587 Hon. JAMES H. WILKERSON,
U. S. District Attorney,
Post Office Building,
Chicago, Ill.MACY *v.* BROWN:

DEAR SIR:

By arrangement with Assistant Attorney General Wemple I enclose herewith some cross-interrogatories or rather questions for cross-examination to be administered to Mr. Edward J. Hazen whose deposition was taken by one of your subordinates at Mr. Hazen's request last week. Mr. Hazen will be in Chicago only Tuesday, the 28th. Mr. Wemple has informed me that you will kindly arrange to have these questions put to him and his answers taken as the cross-examination upon the deposition.

I am much obliged for this which is a great accommodation and economy to all parties.

Yours very truly,

(Signed) JOSEPH H. CHOATE, JR.

JHC, JR

ENCLOSURES"

Edward Jerome Hazen.

AND THEREUPON,

589

EDWARD J. HAZEN, a witness on behalf of the Respondents, resumed the stand and further testified as follows:

Mr. Freeman:

Q. Mr. Hazen, you are the same Mr. Edward J. Hazen who appeared here on the 22nd of April, 1914? A. Yes, sir.

Q. And you were sworn and testified in the case of George H. Macy and others against George Stewart Brown and others, designated by the Secretary of the Treasury as the Tea Board? A. Yes, sir.

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Mr. Freeman: I will ask you, Mr. Hazen, certain questions on behalf of the complainants in that case, in accordance with the letter which has been incorporated into the record.

CROSS-EXAMINATION:

Q. By whom were you employed before your connection with J. C. Whitney Company? A. J. W. Doane & Company.

Q. Have all the purchases of green teas in China made by J. C. Whitney Co. been made by or through you? A. Yes, sir.

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Q. State as nearly as you can the amounts, kinds and qualities of green teas purchased by J. C. Whitney Co. through you for import to the United States in each year since you formed your connection with them. A. I could not state that. I can give you the last two years approximately. This is the season of 1912-1913: 19,243 half-chests of Hoochow; 51,323 boxes of Pingsuey; 5,217 half-chests of country tea.

Edward Jerome Hazen.

592 The season of 1913-1914: 4,584 half-chests country tea; Hoochow, 5,117 half-chests; Pingsuey, 51,051 boxes.

Prior to these years I have not the records with me and cannot give the exact quantities.

Q. What experience, if any, as a buyer of green tea had you before you became connected with J. C. Whitney Company? A. None whatever.

Q. Since what date have you made use of the Read Test in examining samples before buying green teas? A. Since the tea season of 1912.

593 Q. Has the Read Test as used by you been conducted precisely as prescribed by Regulation 22 of Treasury Decision No. 33211? A. Yes.

Q. Have you always, since you began to use the Read Test, applied it to samples before purchasing? A. Yes, sir.

Q. During the same time, have you made any purchases without previously using the test? A. Yes, for export to other countries than the United States.

Q. Have you bought for import into the United States any green teas which when examined by you by means of the Read Test showed any color? A. Not more than the government standard.

594 Q. If so, describe the appearance of the test-sheets which showed the greatest amount of color shown by any tea afterward bought by you for import into the United States? A. The test-sheets showed not more than three spots of color. I do not buy any tea showing more than three spots of color at any time for import into the United States.

Q. What proportion of your purchases during 1913 showed any color when examined by you by means of the Read Test? A. Practically none of the Hoochows showed color; practically none of

the Pingsueys; and none of the country teas 595
showed more than three spots of color in my examination in Shanghai.

Q. In using the Read Test do you test only the muster samples? A. In applying the Read Test, I use practically only the chest muster sample.

Q. State the quantities of Pingsueys and country green teas which you have had rejected during 1913 by the examiners at the ports? A. 184 boxes of Pingsueys; 231 half-chests of country tea.

Q. Have any of these rejections been reversed on appeal? If so, state the quantities and classes of teas affected by these reversals. A. Yes. 75 boxes of Pingsueys, and nine half-chests of country tea have been reversed on appeal. 596

Q. How long does it take you to apply the Read Test to a sample in a thoroughly careful manner? A. A chop of tea containing ten to twelve lines can be done inside of ten minutes.

Q. Please state the name or names or mark or marks by which the three chops of tea referred to in your answers on page 13 of your deposition are known in the trade? A. They are known to the trade as Lee Yik Hing; known also to the Chinese as Lee Cheong Kee.

Q. If these chops are not known by any name or mark, state the grower's name. A. I don't know the grower's name. 597

Q. Who bought the two chops which you rejected for color, if you know? A. According to the record they were bought by Westphall, King & Ramsay, and Barclay Company.

Q. Did you base your opinion that these two chops were colored on the result of an examination by the Read Test? If so, did you make it yourself? A. Yes, I applied the Read Test myself and found

Edward Jerome Hazen.

598 the test-sheets in some lines containing more color than the government standard allowed.

Q. When teas purchased by you are shipped from China for import into the United States, you are required, are you not, to swear to the Consular invoice containing a statement that the teas are uncolored? A. Yes, containing the clause, "to the best of our knowledge and belief."

Q. Have you sworn to such a statement upon the shipment of all teas bought by you for J. C. Whitney Company A. Yes, those shipped to the United States.

599 Q. Have you not within the past year stated to Mr. Frank Hanford, in substance, that since the adoption and use of the Read Test by the United States Government, you have bought green teas prepared with color for other markets, and then shipped them to the United States and had them admitted? A. Emphatically no.

(Signed) EDWARD J. HAZEN.

**Stipulation and Order Settling Form of
Testimony.** 601

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GEORGE H. MACY, OLIVER C.
MACY, GEORGE S. CLAPP, T.
RIDGWAY MACY and IRVING
K. HALL, doing business as
co-partners under the name
of CARTER, MACY & COMPANY,
Complainants,

AGAINST

GEORGE STEWART BROWN, E. C.
HAY and S. B. COOPER, as
General Appraisers of the
United States designated by
the Secretary of the Treasury
of the United States as the
Tea Board,

Respondents.

Eq. 11-85

602

The form and extent of the foregoing statement
of the testimony taken upon the trial of the above-
entitled cause is hereby agreed upon between the
solicitors for the parties thereto, and an order is
prayed authorizing the dispensing with the require-
ments of Rule 75 of the Rules of Practice for the
Courts of Equity, with reference to the statement of
testimony in narrative form.

603

Dated, October 15, 1914.

EVARTS, CHOATE & SHERMAN
Solicitors for complainants.

WM. L. WEMPLE
Solicitor for respondents.

Exhibits.

604 Upon the foregoing stipulation, and upon motion of Evarts, Choate & Sherman, solicitors for complainants, it is

ORDERED that the requirements of Rule 75 of the Rules of Practice for the Courts of Equity with reference to the statement of testimony in narrative form be and they are dispensed with, and the Clerk of this Court is hereby authorized to certify the testimony in the above-entitled cause in the form of the foregoing statement thereof.

Dated: New York, October 15, 1914.

605

C. M. HOUGH
U. S. D. J.

EXHIBITS.**Complainants' Exhibit 1.**

(physical exhibit)

606

Card, to which are attached, and upon which are separately identified as to their contents, eighteen sealed tubes variously containing Prussian blue in different quantities, and ash, sediment and impurities obtained from various analyses of equal amounts of Government standard teas (standard for 1913-14), and the teas involved in the suit (Q. U. I. 5, 6, and 7). Tubes prepared and analyses made by Dr. Joseph A. Deghuée, a witness for the complainants.

Complainants' Exhibit 2.

607

**REFERENCES IN REGARD TO ANALYSIS
OF TEA IN BOOKS PUBLISHED PRIOR
TO 1897.***Food, Its Adulterations and Methods for their
Detection.*

Arthur Hill Hassall,
London, 1876. Page 106.

Determination of soluble constituents and in-
soluble constituents, nitrogenous matter, volatile
oil, theine, water, ash, tannin, gum, cellulose, de- 608
tailed analysis of ash.

Foods, Their Composition and Analysis.

Alexander Wynter Blyth,
London, 1896. Page 411.

Chemical analysis of tea includes determinations
of hygroscopic moisture, theine, extractive matter,
total nitrogen, tannin, ash, determination of gum.

Food, Adulteration and Its Detection.

J. B. Battershall,
New York, 1887. Page 12.

609

Determination of ash, theine, volatile oil,
tannin, extract, gum, insoluble leaf.

The Analysis and Adulteration of Foods.

James Bell
London, 1881. Page 16, Part I.

Analysis of tea—determination of oil, theine,
tannin, albumen of vegetable casein, pectin and
pectic acid, dextrin, cellulose, chlorophyll and
resin. Discussion of adulteration.

Exhibits.

- 610 *Tea, Coffee and Cocoa.*
 J. A. Wanklyn,
 London, 1874. Page 1.

Tea analysis. Determination and discussion of ash, analysis of the ash, extract, free and albuminoid ammonia in tea extract, nitrogen in tea, theine, tannin in tea.

- Principles and Practice of Agricultural Analysis.*
 H. J. Wiley,
 Easton, Pa. 1897, Page 582. Vol. 3
- 611

Tea and Coffee. Special analysis, estimation of caffeine (theine), proteid and nitrogen.

- Commercial Inorganic Analysis.*
 A. H. Allen,
 Philadelphia, Pa. 1892. Page 499, Second
 Ed. Vol. 3, Part 2.

- 612 Determination of essential oil, Boheic acid, caffeine or theine, moisture, chlorophyll, extract, discussion of adulterations of tea, determination of tannin.

- Qurtzen Lehrbuch der Nahrungsmittel-Chemie.*
 Dr. H. Roettger,
 Leipzig, 1894. Page 370.

On page 372 the following statement is made:—

“The chemical examination of tea is in general the same as that of coffee. 1—Moisture is determined at 100 C. 2—The determination of the ash

Exhibits.

content gives an indication of the addition of in- 613
organic constituents. 3—The theine determina-
tion. 4—Tannin determination. 5—Water extract
as in coffee. 6—Artificial coloring as in coffee.”

The examination for color in coffee referred to on
page 367 is a method involving purely chemical
tests.

Die Menschlicher Nahrungs und Genussmittel.

Dr. J. Koenig,

Berlin, 1893. Page 1077.

Chemical examination of tea. Determination of 614
theine, tannin; determination of fermentable in-
gredients, water soluble ingredients; detection of
exhausted tea; detection of artificial coloring; de-
tection of mineral additions; discussion of micro-
scopical examination of tea.

Die Untersuchung Nahrung und Genussmittel.

Dr. M. Mansfeld,

1897. Page 108.

Determination of ash, extract, tannin, theine,
detection of foreign leaves. On page 109 foreign 615
leaves are detected by botanical and microscopical
examination.

Complainants' Exhibit 3.

(physical exhibit : see stipulation and order, p. 208)

Read test sheet of two ounces of Government
standard Gunpowder tea No. 5 (standard for 1913-
14), to which had been purposely added Prussian
blue in the ratio of one part to fifty thousand. Test
made by Dr. Joseph A. Deghuée, a witness for the
complainants.

Exhibits.

616

Complainants' Exhibit 4.

(physical exhibit : see stipulation and order, p. 208)

Read test sheet of two ounces of Young Hyson tea, to which had been purposely added Prussian blue in the ratio of one part to fifty thousand. Test made by Dr. Joseph A. Deghuée, a witness for the complainants.

Complainants' Exhibit 5.617

(physical exhibit : see stipulation and order, p. 208)

Read test sheet of two ounces of Young Hyson tea, to which had been purposely added indigo in the ratio of one part to fifty thousand. Test made by Dr. Joseph A. Deghuée, a witness for the complainants.

Complainants' Exhibit 6.

(physical exhibit : see stipulation and order, p. 208)

618

Read test sheet of two ounces of Government standard tea (standard for 1913-14), to which had been purposely added the least possible amount of blue scraped from an ordinary blue pencil. Test made by Dr. Charles Frederick Chandler, a witness for complainants.

Complainants' Exhibit 7.

(physical exhibit)

Jar containing one-half pound of tea.

Exhibits.

Complainants' Exhibit 8.

619

(physical exhibit)

Jar containing one-fortieth of a milligram of Prussian blue.

Respondents' Exhibit A.

(physical exhibit : see stipulation and order, p. 208)

Read test sheet of tea purposely sprayed with crystal violet in solution, the latter having such concentration that the ratio of violet to tea, when applied, would be one part to fifty thousand. Test made by Dr. Solomon F. Acree, a witness for the respondents.

Respondents' Exhibit B.

(physical exhibit : see stipulation and order, p. 208)

Same as Respondents' Exhibit A.

621

Respondents' Exhibit C.

(physical exhibit : see stipulation and order, p. 208)

Read test sheet of tea purposely sprayed with crystal violet in solution, the latter having such concentration that the ratio of violet to tea, when applied, would be four parts to fifty thousand. Test made by Dr. Solomon F. Acree, a witness for the respondents.

Stipulation and Order with regard to certain Exhibits.

622

Respondents' Exhibit D.

(physical exhibit : see stipulation and order, p. 208)

Read test sheet of tea purposely sprayed with colloidal Prussian blue in solution, the latter having such concentration that the ratio of Prussian blue to tea, when applied, would be one part to thirty thousand. Test made by Dr. Solomon F. Acree, a witness for the respondents.

623

Stipulation and Order with regard to Complainants' Exhibits 3, 4, 5 and 6, and Respondents' Exhibits A, B, C and D.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

624

GEORGE H. MACY, OLIVER C. MACY, GEORGE S. CLAPP, T. RIDGWAY MACY and IRVING K. HALL, doing business as co-partners under the name of CARTER, MACY & COMPANY,

Complainants,

AGAINST

GEORGE STEWART BROWN, E. C. HAY and S. B. COOPER, as General Appraisers of the United States designated by the Secretary of the Treasury of the United States as the Tea Board,

Respondents

Eq. 11-85

Subject to the approval of the Senior Judge of

Stipulation and Order with regard to certain
Exhibits.

Second Circuit, and for the purpose of the appeal 625
heretofore taken by the complainants from the final
decree herein,

IT IS HEREBY STIPULATED, with regard to Com-
plainants' Exhibits 3, 4, 5 and 6, and Respondents'
Exhibits A, B, C and D, the same being original
test-sheets of individual tests of teas made in the
process of testing known as the Read Test, and
being from their very character incapable of dupli-
cation, or of satisfactory reproduction:

FIRST: That for the purposes of the transcript
upon said appeal, said Exhibits be regarded and 626
treated as model physical exhibits; and

SECOND: That upon the argument of said appeal
the requirements of Rule 34 of said Circuit Court
of Appeals as to the production of three copies of
each of said Exhibits be dispensed with.

Dated: October 16, 1914.

EVARTS, CHOATE & SHERMAN,
Solicitors for Complainants.

WM. L. WEMPLE,
Solicitor for Defendants. 627

Stipulation approved and so ORDERED.

Dated: New York, October 21, 1914.

E. HENRY LACOMBE,
Senior Judge,
United States Circuit Court
of Appeals.

Opinion.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

GEORGE H. MACY *et al*

VS.

GEORGE S. BROWN *et al*

Final hearing in Equity.

JOSEPH H. CHOATE, JR., for complainants;

WILLIAM L. WEMPLE, Assistant Attorney General, for defendants.

HOUGH, *D. J.*

Complainants lately proffered for entry into the United States at the port of San Francisco, certain tea, which the Collector of that port rejected, as inferior in purity to the established standards, because of the presence in the imported tea of certain coloring matter.

In so doing the Collector acted in assumed compliance with the "Act to prevent the importation of impure and unwholesome tea," approved March 2d, 1897, and of the Regulations established by the Secretary of the Treasury pursuant to power conferred upon him by said statute.

Thereupon complainants (pursuant to Sec. 6 of the Act) protested against the Collector's decision,* and caused "the matter in dispute to be re-

* The Act requires the original test of tea to be made by an "Examiner", but the action of the Examiner I regard as an act of the Collector.

Opinion.

ferred to a board of three United States General Appraisers." The three defendants herein are the General Appraisers (commonly called the Tea Board) to whom complainants took what is practically an appeal from the Collector's decision. 631

The object of this suit is to obtain the directions of this Court, as to how the Tea Board shall decide the matter submitted to it, pursuant to the statute, and on the motion of the complainants themselves. It would hardly be admitted by the draftsman of the bill, that what I have just said fairly summarizes the purpose of suit, yet I think the justice of the comment will appear from analysis of proven facts, and some study of the statute. 632

The Act of 1897, provides for the annual establishment of standard samples of tea, to be kept in stock, at convenient ports of entry, and all teas "of inferior purity, quality, and fitness for consumption to such standards" shall not be brought into the United States.

The ascertainment of fitness or unfitness is entrusted in the first instance to an Examiner, and from his decision either the Government or importer may "refer the matter in dispute to the Tea Board. This board must consist of General Appraisers, whose general duties, tenure of office, and presumed qualifications are too well known to need further comment, but that the appraisers when constituting the Tea Board, are vested with discretionary powers of at least a quasi-judicial nature seems so plain as to require no more than statement. 633

Admittedly, however, any test, inspection or examination of tea, whether by a single Examiner or the Board, must be conducted in the manner prescribed by statute. Such prescription is found in Section 7, which requires that the "*purity, quality and fitness for consumption (of tea under investigation) shall be tested according to the usages and*

Opinion.

634 *customs of the tea trade, including the testing of an infusion of the same in boiling water, and if necessary, chemical analysis."*

The language quoted gains much in clearness, when something is learned of the growth, varieties, preparation, and marketing of the tea leaf.

"Quality," as used in this Act, evidently refers to the grade or fineness of the leaf, depending principally on whether the leaf was when plucked tender and young or more mature, and also whether the plant producing the leaf was of the best kind or growing under favorable conditions.

635 "Purity," with equal clearness refers to the presence or absence of foreign substances, especially those which would be regarded as foul or dirty; but any adulterant however cleanly or innocuous *per se* would detract from purity.

"Fitness for consumption," is a phrase which in my opinion adds little if anything to the powers conferred, or limitations imposed by the statute; nor has the evidence shown any way in which tea can be unfit for consumption without also being woefully lacking in quality and purity.

636 The purity of tea has long been debased by "facing" or "coloring" or perhaps both simultaneously. Facing is often (if not usually) intended to increase weight, by the admixture of such materials as talc, etc. Coloring has long been thought desirable for "green" teas, of which the color of some (if not most) grades is obtained or improved by mixing Prussian blue, ultramarine or indigo with the tea while it is being dried. One grain of Prussian blue will color seven pounds of tea; and this substance (which is the "lead" or writing part of a "blue pencil") seems the commonest pigment in use.

In some (at least) parts of China, the preparation of tea is carried on by small farmers, the leaves are dried in mud huts, in primitive ovens,

Opinion.

and altogether under conditions necessarily resulting in the deposit of dust and "plain dirt" in the tea leaves. Teas having been colored for generations in these same huts, it is quite possible that forgotten particles of coloring matter may get into tea which it was not intended to color, *i. e.*, change the appearance to the eye. In other words, an uncolored tea may contain some coloring matter. 637

The Customs authorities of this country have long tried to exclude colored teas; and the Secretary of the Treasury having power under the statute to enforce "the provisions of this Act by appropriate regulations" has required Examiners and the Tea Board to use what is known as the "Read Method," to "examine for artificial coloring or facing matter" (Reg. 22). It is further provided that "should a tea prove * * * inferior to the standard in any one of the requisites, viz: quality, quality of infused leaf, or artificial coloring or facing, *it shall be rejected* notwithstanding that it be superior to the standard in some of the qualifications" (Reg. 23). 638

The Read Method consists in calcining under pressure of a spatula and on a piece of clean white paper, a small portion of the tea under investigation. If there be coloring matter (of the kinds above enumerated) in the tea, though in the smallest quantities, there will appear even to the naked eye, and certainly through a microscope of no great power, blue specks or streaks, on the paper,—but ocular investigation will not show whether the blue color is that of ultramarine, indigo or Prussian blue. The regulation then provides that the specked or streaked paper be sent to a chemist for identification of the pigment. As soon as such identification is made the tea must be rejected. 639

If black paper instead of white be used, foreign materials other than blue colors will be detected.

The identification of pigment by a chemist (it may be noted) cannot change the result,—it makes

Opinion.

640 no difference whether the speck turns out to be one blue dye or another, the tea must be rejected, solely because it has coloring matter in it,—kind is immaterial, and the quantity practically means any quantity, for the Read test is thorough, how thorough will hereafter appear.

When complainants offered their tea for entry, the standard samples used by the Government contained no coloring matter whatever, but (as shown by the evidence) did contain a far greater amount of other foreign substances than did complainants'. It is also proven that the tea refused entry is worth
641 in the open market nearly four times as much per pound as is the standard sample by which its acceptance or rejection was gauged.

I regard it as proven beyond doubt that the sole cause for rejecting the tea in question is that it showed coloring matter under the Read test,—and a subsequent analysis qualitative and quantitative has revealed the presence of Prussian blue in proportion ranging (in the specimens examined) from nine to nineteen parts of blue in a million of other and unobjected to elements. There is an agreement of counsel that Prussian blue cannot be proved to produce any deleterious results; it is found men-
642 tioned in the U. S. Pharmacopeia as a drug sometimes used for common purposes, and in the quantities existing in this tea it might be arsenic without producing injury.

The foregoing findings of fact are not made because either Court or counsel think this jurisdiction invoked to pass upon the sense or folly of rejecting tea such as that above described;—these findings seem a necessary preliminary to justifying the original assertion that this action is brought to obtain directions for the Tea Board as to how to decide complainants' appeal.

Complainants' contention is this, (1) the Act of 1897 limits the right of importing tea only in cer-

Opinion.

tain specified particulars; (2) the presence of coloring matter is not *per se* one of the specified grounds for rejection; (3) the only lawful reason for rejection is inferiority to the standard sample in purity, quality and fitness for consumption; and such microscopic portions of Prussian blue as are here shown do not constitute impurity, nor show unfitness in any way; (4) such inferiority, however, can only be ascertained in the specified statutory method, viz: by tests "according to the usages and customs of the tea trade, including the testing of an infusion * * * in boiling water, and if necessary chemical analysis"; (5) the Read test was unknown to the tea trade in 1897, being admittedly of more recent invention, and it is not a chemical analysis. 643 644

Asserting these premises, the bill prays that the Tea Board be compelled by mandatory injunction, (a) not to use the Read test and (b) not to base its decision on the "mere presence of material adapted for use as coloring, irrespective of whether said matter is harmful."

Plainly if the Tea Board were shown everything proven in this Court and then restrained from considering the Read Test, it would be aware that there was coloring matter in harmless quantities in the tea,—and if it were then directed to disregard that fact, there would be nothing left except evidence that the complainants' tea was better and cleaner and more valuable than the standard, and must be admitted. 645

If this in effect is not asking this Court to sit as a Tea Board, I fail to understand the bill.

Of course the request is to sit in more than one case for the decree prayed for would be a guide for all subsequent cases of color in tea.

The form in which an action is brought is often times still determinative of its fate. This suit is

Opinion.

646 for injunctive relief, and there are I am sure several reasons why that form of relief cannot and should not be granted.

If it is ever right to coerce or guide the decision of any tribunal an opportunity must surely first be given for the defendant organization to do something,—it must have a chance to do right before it is assumed to be about to do wrong. This action asserts error before it is committed, and for this reason alone I should refuse injunction.

647 This argument complainants seek to avoid by pointing out that Regulations 22 and 23, deprive the Tea Board of all power to pass upon the “purity” and “quality” of tea if the Read test shows color, for when that occurs “it shall be rejected”. If this be the intent of the Regulations, they are in my opinion futile, for the powers of the Tea Board are derived from the statute itself—it is quite independent of the Secretary, and bound to hold (if such is the opinion of its members) that the presence of coloring matter in harmless quantities does not constitute an inferiority in purity or quality. The Secretary can no more compel the Tea Board to decide any question lawfully coming before it in any particular way, than he can so act
648 toward any other lawfully constituted tribunal.

The real question presented to the original Examiner, to the Tea Board, and sought to be laid before this Court, is whether the standard samples of tea are to be interpreted (so to speak) narrowly or broadly. The samples are chosen by a board of experts (Sec. 2) who are not employees of the Treasury for any other purpose. They have chosen a standard sample which is neither colored nor contains color, so that the real question is whether failure to comply with the standard in the matter of color or coloring matter alone, is to be considered an inferiority in purity or quality. This is emphatically a matter of opinion—of discretion.

Opinion.

The conclusion that the matter in dispute is one of discretion, leads me to dispose of this case by a reference to the recent decision of the Supreme Court in *State of Louisiana vs. McAdoo* (June 22, 1914). As the matter is there put, the Courts "will refuse to substitute their judgment or discretion for that of the official entrusted by law with its execution." It is enough if the act to be enforced by mandamus or forbidden by injunction, be not ministerial; this question of tea is plainly not that. I have refrained from considering whether the Board of General Appraisers is not entitled to the further protection accorded to a judicial body. 649

The cases cited in the decision just mentioned render any further citation unnecessary. To sum the matter up, a court of equity may lawfully be asked to compel a public official to do an act plainly required of him by law, but that official can never be judicially told how to think. If he be empowered ministerially only,—what he thinks is immaterial;—if the law tells him to think and act on his opinion, any judicial advice is in its turn immaterial and indeed impertinent. 650

As the bill must be dismissed for lack of equity, it is not necessary to consider the enquiry whether the Read test is a chemical analysis. It may, however, be pointed out, that an unquestioned chemical analysis of complainants' tea, both qualitative and quantitative, has been made, and the result put in evidence. What is important is the truth, not the way of getting at it. The effect of that proven truth is for the Tea Board—not this Court. 651

Bill dismissed.

July 13, 1914.

652

Decree.**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK.**

GEORGE H. MACY and others,
 doing business as CARTER,
 MACY & COMPANY,
 Complainants,

VS.

653

GEORGE STEWART BROWN, E. C.
 HAY and S. B. COOPER, as
 general appraisers of the
 United States designated by
 the Secretary of the Treas-
 ury of the United States as
 the Tea Board,
 Respondents.

654

This case came on to be heard and was argued
 by counsel and the Court having thereafter filed
 a decision directing that the bill of the complain-
 ants be dismissed for want of equity; it is

ORDERED, Adjudged and Decreed that the bill of
 the complainants be and it is hereby dismissed with
 costs to the defendants to be taxed.

Dated, August 13, 1914.

CHAS. M. HOUGH,
 U. S. D. J.

Assignments of Error.

655

UNITED STATES DISTRICT COURT**SOUTHERN DISTRICT OF NEW YORK.**

GEORGE H. MACY, OLIVER C.
MACY, GEORGE S. CLAPP, T.
RIDGWAY MACY, and IRVING
K. HALL, doing business as co-
partners under the name of
CARTER, MACY & COMPANY,
Complainants,

656

AGAINST

GEORGE STEWART BROWN, E. C.
HAY and S. B. COOPER, as
General Appraisers of the
United States designated by
the Secretary of the Treas-
ury of the United States as
the Tea Board,
Respondents.

ASSIGNMENTS OF ERROR.

657

Now come the complainants in the above entitled cause and file the following assignments of error upon which they will rely upon the prosecution of their appeal from the decree of the United States District Court for the Southern District of New York made and entered herein on the 15th day of August, 1914.

I. The said District Court erred in ordering, adjudging and decreeing that the bill of the complainants be dismissed with costs to the defendants to be taxed.

Assignments of Error.

658 II. The said District Court erred in holding and ruling, as indicated in and by its opinion, that the bill of the complainants should be dismissed for lack of equity.

659 III. The said District Court erred in holding and ruling, as indicated in and by its opinion, that the threatened action of the defendants in excluding teas of the complainants offered for importation to this country for the mere presence in the said teas of color or coloring matter alone, without other cause, would be a proper and lawful exercise of a discretion committed to the said defendants by virtue of their official status as the Appellate Board constituted under the Act of Congress, entitled "An act to prevent the importation of impure and unwholesome tea", approved March 2, 1897, hereinafter referred to as the Tea Act.

IV. The said District Court erred in holding, as indicated in and by its opinion, that the bill of the complainants should be dismissed upon the ground that the application for injunctive relief set forth in the prayer thereof was premature.

660 V. The said District Court erred in holding, as indicated in and by its opinion, that the regulations issued by the Secretary of the Treasury, in the ostensible exercise of the power committed to him by the said Tea Act, do not control the action of the defendants as the Appellate Board constituted under said Act, and that for that reason the defendants could not properly be enjoined from obeying any such regulations, even though the same were unauthorized by law, or contrary to said Tea Act. The regulations referred to are those which require that teas offered for import be rejected if they contain any color whatsoever, and those which

Assignments of Error.

require the use in the examination of such teas of 661
the method of examination set forth in Regulation
22 of T. D. 33211.

VI. The said District Court erred in holding, as indicated in and by its opinion, that the question whether failure to comply with the standard provided under said Tea Act in the matter of color, or coloring matter, alone, is to be considered an inferiority in purity or quality, is a question of opinion or of discretion, committed by the said Tea Act for decision solely to the defendants as such Appellate Board.

662

VII. The said District Court erred in holding, as indicated in and by its opinion, that the said Tea Act authorizes the defendants as such Appellate Board to condemn as inferior in purity tea containing harmless foreign matter less in total amount than the foreign matter contained in an equal quantity of the standard tea.

VIII. The said District Court erred in holding, as indicated in and by its opinion, that it is unnecessary to decide the question whether or not the method of examination provided for by Regulation 663
22 of T. D. 33211 is or is not authorized by said Tea Act.

IX. The said District Court erred in holding that the standard teas established under the said Tea Act, in comparison with which the complainants' teas must be examined, contained no color.

X. The said District Court erred in failing to hold that the action which the defendants threaten to perform in excluding teas of the complainants offered for import for the mere presence in said teas

Assignments of Error.

664 of color or coloring matter alone, is unauthorized by the said Tea Act, or by any other existing provision of law, and should be restrained by injunction.

XI. The said District Court erred in failing to hold that the regulations issued by the Secretary of the Treasury requiring the rejection of tea offered for import, if the same shall contain color or coloring matter, to *any* extent, regardless of whether the total impurity or foreign matter present in the teas so offered be less than in the standards prescribed by said Tea Act, are unauthorized and void, in that
665 said regulations require the rejection of tea which may be, and which may be found upon due examination to be, vastly superior to the said standards in all of the requirements established by said Tea Act.

XII. The said District Court erred in failing to hold that said Regulation 22 of T. D. 33211 is void and unauthorized by said Tea Act, or by any other provision of law, in that it requires the use of a method of examination which cannot possibly test that which the statute requires to be tested, namely,
666 the relative purity, quality and fitness for consumption of the tea offered for import and of the standard with which it is to be compared.

XIII. The said District Court erred in failing to hold that said Regulation 22 of T. D. 33211 is void and unauthorized by said Tea Act, or by any other provision of law, because it requires the use of a method of examination which fails to comply with the requirements of said Tea Act in that it is neither in accordance with the customs or usages of the tea trade, nor a chemical analysis.

Assignments of Error.

XIV. The said District Court erred in failing to hold that the action which the defendants threaten to perform in examining the teas referred to in the bill of complaint by means of the method prescribed by Regulation 22 of T. D. 33211 is void and unauthorized by said Tea Act, or by any other provision of law, and should be restrained by injunction. 667

XV. The said District Court erred in failing to hold that the construction and interpretation of the statute and the meaning of its terms, including the meaning of the term "purity", was for the Court to determine, and not for the defendants as the Appellate Board constituted by said Tea Act. 668

XVI. The said District Court erred in failing to hold that in particular the true construction and meaning of the statutory requirement that the purity of tea offered for import shall be equal to that of the standard was not for the defendants, as such Board, finally to determine, but was, like other statutory requirements, a proper subject of interpretation by the Court.

XVII. The said District Court erred in failing to hold that said Tea Act makes no distinction between different kinds of impurities. 669

XVIII. The said District Court erred in failing to hold that, by reason of the fact that said Tea Act makes no distinction between different kinds of impurities, the defendants could not lawfully obey the orders addressed to them in the form of the regulations of the Secretary of the Treasury requiring them to reject teas offered for import if inferior to the appropriate standard with respect to color, even though superior to said standard in general purity and freedom from foreign matter.

Assignments of Error.

670 XIX. The said District Court erred in failing to hold that it was and is the duty of the defendants to disregard the said Treasury regulations which require the rejection of tea for color only, and those which require the use in the examination of teas by them of the method of examination set forth in Regulation 22 of T. D. 33211.

XX. The said District Court erred in failing to hold that the defendants should be enjoined from obeying said regulations.

671 XXI. The said District Court erred in failing to hold that by mandatory injunction the defendants should be required to examine the teas in question in comparison with the appropriate standards in the manner required by the said Tea Act and not by the method prescribed by the said Regulation 22 of T. D. 33211, and upon the said examination to determine whether in their judgment the said teas fulfil the requirements of the said Act as interpreted by the Court.

672 XXII. The said District Court erred in failing to hold, and to adjudge and decree, that the complainants were entitled to the injunctive relief prayed for in the bill of complaint.

Dated: New York, September 17, 1914.

EVARTS, CHOATE & SHERMAN,
Solicitors for Complainants,
Office and Post Office Address,
60 Wall Street,
Borough of Manhattan,
New York City.

Petition and Order Allowing Appeal.

673

UNITED STATES DISTRICT COURT**SOUTHERN DISTRICT OF NEW YORK**

GEORGE H. MACY, OLIVER C.
MACY, GEORGE S. CLAPP, T.
RIDGWAY MACY, and IRVING
K. HALL, doing business as
copartners under the name of
CARTER, MACY & COMPANY
Complainants

674

AGAINST

GEORGE STEWART BROWN, E. C.
HAY, and S. B. COOPER, as
General Appraisers of the
United States designated by
the Secretary of the Treasury
of the United States as the
Tea Board

Respondents

675

The complainants above named, considering themselves aggrieved by the final decree of this court made and entered herein on the 15th day of August, 1914, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons set forth in the assignment of errors filed herewith, and pray that their appeal be allowed, and that a citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for

Petition and Order Allowing Appeal.

676 the Second Circuit, under the rules of such court
in such cases made and provided;

AND your petitioners further pray that the
proper order relating to the security to be required
of them be made.

Dated: New York, September 18, 1914.

EVARTS, CHOATE & SHERMAN
Solicitors for complainants,
Office and P. O. Address: 60 Wall Street,
Borough of Manhattan, City of New York.

To
677 ALEXANDER GILCHRIST, JR., ESQ.,
Clerk.

The appeal prayed for in the foregoing petition
is hereby allowed upon the complainants giving a
bond as required by law for the sum of \$250.

Dated. New York, September 18th, 1914.

C. M. HOUGH
United States District Judge.

[A bond in compliance with the above require-
ment was duly approved and filed in the office of
678 the Clerk of United States District Court for
the Southern District of New York, September 19,
1914.]

Citation.

679

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

GEORGE H. MACY, OLIVER C.
MACY, GEORGE S. CLAPP, T.
RIDGWAY MACY, and IRVING
K. HALL, doing business as
copartners under the name of
CARTER, MACY & COMPANY,
Complainants,

AGAINST

GEORGE STEWART BROWN, E. C.
HAY, and S. B. COOPER, as
General Appraisers of the
United States designated by
the Secretary of the Treasury
of the United States as the
Tea Board,
Respondents.

680

UNITED STATES OF AMERICA: ss.:

681

To GEORGE STEWART BROWN, E. G. HAY and S. B.
COOPER as General Appraisers of the United
State designated by the Secretary of the Treas-
ury of the United States as the Tea Board:

YOU ARE HEREBY CITED AND ADMONISHED to be and
appear before the United States Circuit Court of
Appeals for the Second Circuit to be held at the
court rooms thereof in the Federal Building in the
Borough of Manhattan in The City of New York,
in the District and Circuit above named on the 16

Citation.

682 day of October, 1914, pursuant to the appeal and
order allowing the same filed in the above entitled
suit, being in Equity No. 11-85, in the office of the
Clerk of the United States District Court for the
Southern District of New York on the 15th day of
August, 1914, wherein George H. Macy, Oliver C.
Macy, George S. Clapp, T. Ridgway Macy and
Irving K. Hall, doing business as copartners under
the name of Carter, Macy & Company are appellants
and you are appellees, to show cause, if any there
be, why the decree made and entered in said suit on
the 15th day of August, 1914, and referred to in
683 said appeal should not be corrected and speedy justice
should not be done in that behalf.

Given under my hand at the Borough of Manhattan in The City of New York in the District and Circuit above named this 18th day of September, 1914 and of the independence of the United States the 139th.

C. M. HOUGH,
U. S. District Judge for the Southern
District of New York.

684 [Endorsed: Due service of a copy of the within
citation is hereby admitted this 21st day of
September, 1914, Wm. L. Wemple, Solicitor for
respondents. Filed Sept. 22, 1914, U. S. District Court, S. D. of N. Y.]

Stipulation as to Transcript.

685

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

GEORGE H. MACY, OLIVER C.
MACY, GEORGE S. CLAPP,
T. RIDGWAY MACY and IRVING
K. HALL, doing business as
co-partners under the name
of CARTER, MACY & COMPANY,
Complainants,

vs.

Eq. 11-85.

GEORGE STEWART BROWN, E. G.
HAY and S. B. COOPER, as
General Appraisers of the
United States designated by
the Secretary of the Treasury
of the United States as the
Tea Board,
Repondents.

686

IT IS HEREBY STIPULATED AND AGREED, that the 687
foregoing is a true transcript of the record of the
said District Court in the above-entitled matter as
agreed on by the parties.

Dated , 1914.

Solicitors for Complainants.

Solicitor for Respondents.

688

Clerk's Certificate.

UNITED STATES DISTRICT COURT, } ss. :
 SOUTHERN DISTRICT OF NEW YORK, }

GEORGE H. MACY, OLIVER C.
 MACY, GEORGE S. CLAPP,
 T. RIDGWAY MACY and IRVING
 K. HALL, doing business as
 co-partners under the name
 of CARTER, MACY & COMPANY,
 Complainants,

689

vs.

Eq. 11-85.

GEORGE STEWART BROWN, E. G.
 HAY and S. B. COOPER, as
 General Appraisers of the
 United States designated by
 the Secretary of the Treasury
 of the United States as the
 Tea Board,
 Repondents.

690

I, ALEXANDER GILCHRIST, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this day of , in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the said United States the one hundred and thirty-ninth.

Clerk.

231 United States Circuit Court of Appeals for the Second Circuit.

No. 158—October term, 1914. Argued May 12, 1915. Decided June 8, 1915.

GEORGE H. MACY AND OTHERS, DOING BUSINESS AS
partners under the firm name of Carter Macy &
Company, complainants-appellants,

v.

GEORGE STEWART BROWNE, E. C. HAY, AND T. B.
Cooper as General Appraisers, designated as
the Tea Board, defendants-appellees.

Appeal from the District Court of the United States for the Southern District of New York. Before Lacombe, Coxe, and Ward, circuit judges.

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill. Complainants are importers of tea. Respondents, U. S. General Appraisers, are members of the appellate board, created under the act of March 2nd, 1897 (as amended May 16th, 1908), known as the tea law, to reexamine teas already examined by tea examiners appointed under the same act. The function of these examiners and re-examiners is to determine whether or not teas offered for import comply with the requirements, imposed by the tea law for admission into the United States.

232 The act is entitled "An act to prevent the importation of impure and unwholesome teas." Its first section makes it unlawful "to import or bring into the United States any merchandise as tea, which is inferior in purity, quality, and fitness for consumption to the standards provided in section 3 of this act." The third section provides that the Secretary of the Treasury, upon recommendation of the board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of tea imported, and shall procure and deposit in certain custom houses duplicate samples of such standards, in sufficient number to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, "of inferior purity, quality, and fitness for consumption to such standards" are declared to be within the prohibition of the first section. Details as to examination and re-examination are provided for, the seventh section concluding with the statement: "That in all cases of examination and re-examination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, by chemical analysis."

The standards have been duly established and duplicate samples deposited in the custom houses.

Certain green teas of complainants were offered by them for import, were rejected by the examiner, and are now before respondents for re-examination. The contention of complainants is that respondents threaten, upon such re-examination, to adopt a method of examination and to apply a criterion for judging the admissibility of the teas, neither of which is authorized by the tea act.

Section 10 gave to the Secretary of the Treasury "power to enforce the provisions of this act by appropriate regulations."

233 He has prescribed a code of regulations, to two of which, Nos. 22 and 23, complainants take exception. They provide for what is called the "Read test," to determine whether the tea being examined contains "artificial coloring or facing matter." They further provide that "as soon as coloring or facing matter is identified, then the tea should be rejected," but "if the tea is clearly equal to the standard as regards coloring or facing matter" apparently it is not to be rejected. In other words, if the standard of a particular kind or grade of tea contains no coloring or facing matter, offered tea which contains any coloring or facing matter, however, small in quantity, must be rejected. If the standard contains some such coloring or facing matter, all tea which contains such matter in excess of the standard must be rejected. The examiner rejected complainant's teas "for color; that is to say, on the ground that they were inferior in purity to said standards established as aforesaid, by reason of the alleged inclusion therein of certain coloring matter."

The opinion of Judge Hough will be found in F. R.

LACOMBE, C. J.; Much testimony was taken and the District Court found that when complainants offered their tea for entry the standard samples contained no coloring matter whatever, but did contain a far greater amount of other foreign substances than did complainants'. That the tea refused entry is worth in the open market nearly four times as much per pound as is the standard sample by which its acceptance or rejection was gauged. That the sole cause for rejecting the tea in question is that it showed coloring matter, to wit, Prussian blue, in proportion ranging from nine to nineteen parts of blue in a million of other and unobjected to elements. It is conceded by both sides that Prussian blue can not be proved to product any deleterious results; that it is found in the U. S.

Pharmacopeia as a drug sometimes used for common purposes. A careful study of the testimony results in the conclusion that these findings of fact are entirely accurate.

234 Manifestly Congress undertook to deal fully with the subject of tea importation. It provided for the creation of this Board of Tea Appeal; also for the adoption of physical standard samples; to the members of the board it confided the authority—and the sole authority—to determine whether samples of tea offered for entry are or are not inferior to the standards in the particulars specified. Congress, however, has specified carefully the particulars in which this in-

feriority must be found in order to reject the tea. The question to be answered upon every examination is: Are the teas "of inferior purity, quality, and fitness for consumption to such standards"? Although the sentence is conjunctive, we think it may fairly be construed disjunctively, as providing that tea shall be prohibited which falls below the standard, either in purity, in quality, or in fitness for consumption.

It is now contended for the Government that although the board may be satisfied that a certain lot of tea is fully equal, indeed superior, to the standard in purity, in quality, and in fitness for consumption, the board must nevertheless reject it if they find that it contains coloring or facing matter. It does not seem to us that the statute warrants such rejection unless the coloring matter plus other impurities makes the tea below standard in purity, or the coloring matter makes the tea below standard in quality, or the coloring matter makes the tea less fit for consumption than the standard. Within the field of investigation confided to them the board of examiners are the sole judges, but they have been given no authority to extend the field of investigation beyond the limits staked out by Congress. If Congress had intended that tea should be rejected because of coloring matter which was not sufficient in quantity or such in character as to bring it below standard in the three particulars specified, it must be presumed that Congress would have so stated in the act. We do not see that *Buttfield v. Stranahan*, 192 U. S., 470, applies. That case held merely that the board was the final judge in its allotted field; it did not indicate that the board had any power to extend that field.

The record shows that this tea is superior to standard in all three specified requirements. It also shows that nevertheless it will be rejected as soon as the board examines it because of a fourth unspecified requirement. The members of the board are appointed by the secretary, who has the power to remove them; it is not disputed that they will act in conformity to the requirements he has prescribed for their guidance in Regulations 22 and 23. Indeed, upon enquiry as to the issues by the district judge, counsel for the Government conceded that it was the intention of the officers of the Government "to keep out all the tea that has any coloring matter in it, no matter whether such matter was put into it, so far as the observer can discover, for the purpose of coloring it or not, or whether it is mere carelessness or accident." Also that teas will be rejected "if the said teas are found to contain matters adapted for use as coloring or facing of any kind or in any quantity, irrespective of whether the same is or is not used or applied so as to conceal damage or inferiority."

If the Government officers have no authority to reject teas superior to the standard in all the requirements specified by law, such rejection would be an invasion of the rights of complainants, who, relying on the statute, have brought to this country teas which the statute advised them they could enter. This is no academic con-

struction of a statute in advance of its application; we are dealing with a concrete case, the teas have been bought and brought here at large expense in reliance upon the statute, they have been once rejected, and unless the injunction be granted they will inevitably be again rejected, with the result that they must be removed from this country or destroyed. There is no ground for the contention that the application is premature on the theory that non constat

what is shown the board may finally admit the teas; the
236 record establishes the converse of this proposition. Time will

be saved and loss reduced by now enjoining a threatened injury, if the action which is threatened is without authority of law. *Merritt v. Walsh*, 104 U. S., 694; *Philadelphia Company v. Stimson*, 233 U. S., 605; *Williams v. Molther*, 198 F. R., 460; *Vicksburg v. Waterworks Company v. Vicksburg*, 185 U. S., 65.

As to the so-called Read test, we do not think it necessary to discuss the question whether such a method of investigation may or may not be properly described as "chemical." To the board exclusively is left the determination of the question whether offered teas are equal to the standards in purity, quality, or fitness for consumption; whatever means they may adopt to satisfy themselves as to the degree of purity, of quality, or of fitness it would seem they may use; but in applying the information obtained by such use to the question "shall this tea be admitted or rejected," they must follow the directions only of the statute and of such regulations as are not inconsistent with the statute. That they intend to follow the directions of Regulations 22 and 23 is undisputed. In our opinion these regulations are inconsistent with the statute, because they undertake to direct the board to reject tea which contains any coloring matter, although the board may be convinced as the result of all the tests they apply that the coloring matter is present in such harmless quantities that the tea is not inferior to the statutory standards in purity, quality, or fitness for consumption.

The decree is reversed and cause remitted with instructions to decree in conformity with this opinion.

J. H. Choate, jr., for the appellants.

W. L. Wemple, special asst. atty. general for the appellees.
237 At a stated term of the United States Circuit Court of

Appeals in and for the Second Circuit, held at the court rooms in the post-office building in the city of New York, on the 18th day of June, one thousand nine hundred and fifteen. Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, circuit judges.

GEORGE H. MACY ET AL., COMPLAINANTS-APPELLANTS,

VS.

GEORGE STEWART BROWN ET AL., AS GENERAL APPRAISERS, etc., DEFENDANTS-APPELLEES.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said district court be, and it hereby is, reversed and the cause remanded, with instructions to decree in conformity with the opinion of this court.

E. H. L.

It is further ordered that a mandate issue to the said district court in accordance with this decree.

238 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Geo. H. Macy *vs.* Geo. Stewart Brown. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 18, 1916. William Parkin, clerk.

239 United States Circuit Court of Appeals for the Second Circuit.

BYRON S. WAITE, ISRAEL F. FISCHER, AND HENDERSON M. Somerville, as General Appraisers of the United States, designated by the Secretary of the Treasury of the United States as the Tea Board, successors in office of George Stewart Brown, E. G. Hay, and S. B. Cooper, General Appraisers, etc., and substituted for them in this suit, defendants-appellants,

against

GEORGE H. MACY, OLIVER C. MACY, GEORGE S. Clapp, T. Ridgway Macy, and Irving K. Hall, doing business as copartners under the name of Carter, Macy & Company, respondents.

The above-named defendants constituting the Board of Tea Appeals under the act of Congress of March 2nd, 1897, conceiving themselves aggrieved by the judgment and order of the United States Circuit Court of Appeals for the Second Circuit, entered on June 18th, 1915, in the above-entitled suit, reversing the judgment of the United States District Court for the Southern District of New York, do hereby appeal from said judgment and order, to the Supreme Court of the United States, and they pray that their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, June 14th, 1916.

WILLIAM H. WEMPLE,
*Special Assistant Attorney General,
Attorney for Defendants-Appellants,
No. 30 Broad Street, Manhattan, New York City.*

240 And now, to wit, on June 16th, 1916, it is ordered that the aforesaid appeal be allowed as prayed for.

HENRY WADE ROGERS, *U. S. C. J.*

241 (Endorsed :) United States Circuit Court of Appeals for the Second Circuit. Byron S. Waite, Israel F. Fischer, and Henderson M. Somerville, as general appraisers, etc., defendants-appellants, against George H. Macy, Oliver C. Macy, George S. Clapp, T. Ridgway Macy, and Irving K. Hall, doing business, etc., respondents. (Copy.) Order allowing appeal. William L. Wemple, Crim & Wemple, attorneys for defts.-appellants. Office and post-office address, 30 Broad Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed June 17, 1916. William Parkin, clerk.

242 Supreme Court of the United States.

BYRON S. WAITE, ISRAEL F. FISCHER, AND HENDERSON M. SOMERVILLE, as General Appraisers of the United States, designated by the Secretary of the Treasury of the United States as the Tea Board, successors in office of George Stewart Brown, E. G. Hay, and S. B. Cooper, General Appraisers, etc., and substituted for them in this suit, defendants-appellants.

against

GEORGE H. MACY, OLIVER C. MACY, GEORGE S. CLAPP, T. RIDGWAY MACY, and IRVING K. HALL, doing business as copartners under the name of Carter, Macy & Company, respondents.

Assignment of errors.

And now come the appellants, Byron S. Waite, Israel F. Fischer, and Henderson M. Somerville, as general appraisers designated by the Secretary of the Treasury as the Board of Tea Appeals, under the act of Congress approved March 2nd 1897, being the successors in office of George Stewart Brown, E. G. Hay, and S. B. Cooper, general appraisers, etc., and make and file this, their assignment of errors:

1. The Circuit Court of Appeals erred in not dismissing the appeal for want of jurisdiction:

(a) Because in the District Court the jurisdiction of that court was in issue, and that issue was decided adversely to the complainants; in such cases appeal lies direct to the Supreme Court under §238 of the Judicial Code.

(b) Because there is no equity in the bill (*State of Louisiana vs. McAdoo*, 234 U. S., 627).

(c) Because the determination whether conditions existed which conferred the right to import was intended by Congress to be finally settled, not by a judicial proceeding, but by the action of agents of the Government upon whom power on the subject was conferred.

2. The Circuit Court of Appeals erred in finding and holding that the importation in question was equal and superior in purity, quality, and fitness for consumption to the standard established by the Secretary of the Treasury.

3. The Circuit Court of Appeals erred in defining or attempting to define the "field of investigation" confided by the statute to the examiners of tea and the Board of Tea Appeals.

4. The Circuit Court of Appeals erred in not holding this case to be controlled by the judgment in *Buttfield vs. Stranahan* (192 U. S. 470).

5. The Circuit Court of Appeals erred in holding that regulations 22 and 23, promulgated under the authority contained in the act of March 2nd, 1897, are inconsistent with that act.

Dated New York, June 14, 1916.

WM. L. WEMPLE,
30 Broad St., N. Y. C.,
Special Assistant Attorney General,
Solicitor for Appellants.

(Endorsed:) Supreme Court of the United States. Byron S. Waite, Israel F. Fischer, and Henderson M. Somerville, as general appraisers, etc., defendants-appellants, against George H. Macy, Oliver C. Macy, George S. Clapp, T. Ridgway Macy, and Irving K. Hall, doing business, etc., respondents. (Copy.) Assignment of errors. William L. Wemple, Crim & Wemple, attorneys for defts.-appellants, office and post-office address, 30 Broad Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed June 17, 1916. William Parkin, clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 244, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of *George H. Macy et al. against George Stewart Browne et al.*, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the second circuit, this 26th day of June, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the said United States the one hundred and fortieth.

[SEAL.]

WM. PARKIN, *Clerk.*

BYRON S. WAITE, ISRAEL F. FISCHER, AND HENDERSON
M. Somerville, as General Appraisers, etc., defend-
ants-appellants,

against

GEORGE H. MACY, OLIVER C. MACY, GEORGE S. CLAPP,
T. Ridgway Macy, and Irving K. Hall, doing busi-
ness, etc., respondents.

It is hereby stipulated that the issue and service of citation in the
above-entitled appeal be waived. Dated New York, July 31st, 1916.

JOSEPH H. CHOATE, JR.,

Solicitor for Appellees.

WM. L. WEMPLE,

Solicitor for Appellants.

(Indorsed:) Supreme Court of the United States. Byron S. Waite, Israel F. Fischer, and Henderson M. Somerville, as General Appraisers, etc., defendants-appellants, against George H. Macy, Oliver C. Macy, George S. Clapp, T. Ridgway Macy, and Irving K. Hall, doing business, etc., respondents. Waiver of citation. Office of the clerk. Supreme Court U. S. Received Aug. 2, 1916. Crim & Wemple, attorneys & counsellors at law, 30 Broad Street, New York.

(Indorsed:) File No. 25465. U. S. Circuit Court Appeals, 2d Circuit. Term No. 635. Byron S. Waite, Israel F. Fischer, and Henderson M. Somerville, as General Appraisers, designated by the Secretary of the Treasury as the the Board of Tea Appeals, appellants, vs. George H. Macy, Oliver C. Macy, George S. Clapp, T. Ridgway Macy, and Irving K. Hall, doing business as copartners under the name of Carter, Macy & Company. Filed August 26th, 1916. File No. 25465.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

BYRON S. WAITE, ISRAEL F. FISCHER, AND
Henderson M. Somerville, as General
Appraisers, designated by the Secre-
tary of the Treasury as the Board of
Tea Appeals, appellants,

v.

GEORGE H. MACY, OLIVER C. MACY,
George S. Clapp, T. Ridgway Macy,
and Irving K. Hall, doing business as
copartners under the name of Carter,
Macy & Company.

} No. 255.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.*

BRIEF FOR THE APPELLANTS.

THE FACTS.

This is an appeal from a decision of the Circuit Court of Appeals for the Second Circuit, which reversed a decree of the District Court dismissing a bill in equity brought by the appellees, Carter, Macy & Company, against the appellants, who constitute the individual members of a Board of Tea Appeals to

reexamine teas, in accordance with the provisions of the tea act of March 2, 1897 (29 Stat. 604).

The appellees are importers of tea. They imported certain teas which, upon arrival at San Francisco, were examined by the tea examiner at that port. It is alleged in the bill (R. 3, Par. IV) and admitted in the Answer (R. 15, Par. 3), that the teas were rejected by the examiner upon the ground that they contained coloring matter, rendering them inferior to the Government standard in purity. The importers (appellees) thereupon protested, and referred the matter to the Board of Three General Appraisers (appellants) designated by the Secretary of the Treasury in accordance with the statute (hereafter referred to as the Tea Board) for reexamination of the teas in accordance with section 6 of the tea act.

Before the Tea Board had acted upon the protest or reexamined the teas, this suit was brought to restrain them from using a form of test for the detection of coloring matter, known as the Read test (Regulations 22 and 23 of Treasury Decisions No. 33,211), in reexamining the teas in question, such test being alleged by the complainants in the suit (the present appellees) to be illegal, and to restrain the Tea Board "also from making the result of their examination, in whatever manner made, depend upon the mere presence or absence of material adapted for use as coloring or facing matter, irrespective of whether the total impurity, if any, present in the said teas, including such coloring or facing matter, is greater or less than in the said standard, and irrespective of

whether the said matter is harmful or deceptive in quantity, character or method of application." (R. 10, Par. XIX.)

It was alleged in the bill that the board intends to examine the teas by the Read test (R. 4, Par. VI), and that the board threatens to exclude the teas if by that test or otherwise the presence of coloring or facing matter should be revealed. (R. 4, 5, Par. VII, Par. VIII, Par. IX.) These allegations were all denied by the Tea Board. (Answer, R. 15, pars. 5, 6, 7.) In answer to the averment that the Board intends to use the Read test, they (the Board) stated "that when teas are brought before them for final reexamination, it is their duty to, and they do in fact in every case, reexamine the same in accordance with the law as found in the Act of March 2, 1897, and the regulations made pursuant to authority therein granted and not otherwise" (R. 15, par. 4); and that they "have heretofore and will hereafter finally reexamine all teas duly brought before them in accordance with the law as hereinabove defined, and not otherwise" (R. 15, par. 5).

The Tea Board in their answer set forth lack of jurisdiction of the District Court to enjoin or control agencies and tribunals established for carrying the law into effect and at the opening of the trial moved to dismiss for lack of jurisdiction. The court reserved decision on the motion. Trial was thereupon had on oral evidence and deposition.

At the trial it was stated by the District Judge (R. 144) and admitted by complainants' counsel that the teas in suit did—

both by the Read test, no matter whether it is lawful or not, and by an ultimate chemical analysis, contain a larger proportion of Prussian blue than the Government standard.

Mr. CHOATE. That is the fact, or rather, a larger proportion of color. I didn't say of Prussian blue.

The COURT. Well, color. I think it is pretty fairly well shown it was Prussian blue.

And the complainants' witness, Deghué, testified that there was some coloring matter in the Government standard teas, but more coloring matter in the teas in suit (R. 58). It was also admitted at the trial that, as stated by counsel for the Government (R. 55):

In this case the teas have been examined and have passed, and will not be examined again, all purity tests excepting just this for the particular kind of impurity, namely, blue.

The District Court, on July 13, 1914 (215 Fed. 456), dismissed the bill for lack of equity.

THE DECISION OF THE DISTRICT COURT.

The District Court, per Hough, J., in dismissing the bill, held:

- (a) That "this action is brought to obtain directions for the Tea Board as to how to decide complainants' appeal," and that the complainants were in effect "asking

this court to sit as a tea board"; that "this action asserts error before it is committed, and for this reason alone I should refuse injunction" (R. 214, 215, 216);

- (b) That the complainants' contention that the Treasury regulations were illegal, as depriving the Tea Board of all power to pass on the purity and quality of the tea, was futile, inasmuch as "the powers of the Tea Board are derived from the statute itself—it is quite independent of the Secretary, and bound to hold (if such is the opinion of its members) that the presence of coloring matter in harmless quantities does not constitute an inferiority in purity or quality. The Secretary can no more compel the Tea Board to decide any question lawfully coming before it in any particular way, than he can so act toward any other lawfully constituted tribunal" (R. 216);
- (c) That what "is to be considered an inferiority in purity or quality" is "emphatically a matter of opinion—of discretion" of the Tea Board (R. 216);
- (d) That "as the bill must be dismissed for lack of equity, it is not necessary to consider the inquiry whether the Read test is a chemical analysis" (R. 217).

On appeal, the Circuit Court of Appeals for the Second Circuit, June 8, 1915 (224 Fed. 359), reversed the decree of the District Court.

THE TEA ACT IN QUESTION.

The act of March 2, 1897, c. 358, 29 Stat. 604 (see Appendix A) is entitled "An act to prevent the importation of impure and unwholesome tea." Briefly stated, it provides for the establishment yearly of Government standard samples of teas by the Secretary of the Treasury on the recommendation of a board of seven tea experts. The importation of "any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided," is prohibited. Imported tea is, in the first instance, to be examined, in comparison with the proper standards, by an examiner. If the finding of the examiner is adverse to the importer, the latter may protest and have the matter "referred for decision to a board of three United States General Appraisers, to be designated by the Secretary of the Treasury," whose duty it is to make a final examination. If this special Tea Board finds the tea in question to be equal to the standard in the specified requirements, i. e., "purity, quality, and fitness for consumption," it issues a permit for a release of the tea to the importer. If, on the other hand, the Board finds the tea to be inferior to the standard in any one of such requirements, i. e., either in purity or quality or in fitness for consumption, the importer must give bond to export the tea out of the United States within six months, and in default of such exportation "the collector (of customs), at the expiration of that time, shall cause the same to be destroyed." The act provides (section 7), that in all cases of examination

or reexamination of teas by examiners or by Boards of United States General Appraisers, "the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis."

By section 10, "the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations."

THE READ TEST.

The Read test is a modern and effective method of ascertaining whether tea contains coloring matter (frequently Prussian blue), or facing matter. Such matter may be introduced for the purpose of improving the appearance of low grades of tea, a very small quantity being enough to change its appearance (see testimony of complainants' witness, Dallas, R. 31, 33; see also Government witness, Hazen, R. 187, 188-190). Prior to the invention of the Read test, the customary tests in the tea trade were what are known as the cup test and the visual inspection test (see complainants' witness, Dallas, R. 26, 27, 174; complainants' witness, Thorn, R. 42, 47; and statement of complainants' counsel, R. 182, as follows:

I will accept the concession as outlined by Mr. Wemple [the Government's attorney], the statement to the effect that no form of examination or test was known to the tea trade, prior to the introduction of the Read test,

except the cup test as described by Mr. Dallas and other witnesses, and the visual examination of the dry leaf).

The complainants' witness, Deghuée, described the Read test (R. 52) as—

a test which merely detects particles of blue coloring matter which may be present in a tea, provided they are present in physical conditions, that is the size particularly, in which they can be detected in that manner, and ignores the possible presence of all other impurities in the tea.

Q. It is capable only of detecting coloring or facing matters?

A. Coloring or facing matter.

He described the Read test as follows (R. 62):

The regulation prescribes a mechanical separation of dust from the tea, and provides that if certain blue particles appear on the sheets of paper, after pressing the dust against the sheet of paper, that these sheets shall be sent to a chemist, and after identification by the chemist the tea shall be excluded or admitted or, rather excluded in that case; nothing is mentioned about the chemical analysis or what the chemist is to do.

Treasury Regulations 22 and 23, prescribing the Read test for the examination of imported teas and requiring the rejection of teas found upon such examination to contain coloring matter, as originally promulgated, March 25, 1912, by the Secretary of the Treasury, will be found in Treasury Decision 32322.

Regulation 22 was modified on February 24, 1913, by the Secretary of the Treasury and will be found as so modified in Treasury Decision 33211. Regulation 23 remained unchanged. These regulations, as so modified, were as follows:¹

22. To examine for artificial coloring or facing matter, it is ordered that the following described method be used, in comparison with the standard, viz:

READ METHOD, WITH ADDITIONS AND MODIFICATIONS, FOR EXAMINATION OF TEA.—Place 2 ounces of tea in a sieve 5 inches in diameter, having 40 meshes to the inch, and sift a small quantity of the dust onto a semi-glazed white paper about 8 by 10 inches. The amount of dust placed on the paper should be approximately the weight of one- (fourth) *eighth* of a silver half dime, or about (four) *two* grains. To get the requisite amount of dust it is sometimes necessary to rub the leaf against the bottom of the sieve. The dust should be well distributed or peppered over the surface of the paper. The paper is placed on a plain, firm surface, preferably glass or marble, and the dust crushed by drawing over it, with considerable pressure, (the point of) a flat steel spatula, *about 5 inches long*. This is done repeatedly, the tea dust being ground almost to a powder and the particles of coloring matter,

¹The words in parentheses in the regulation occurred in the regulation as originally promulgated, but were omitted from the regulation as modified in 1913. Words in italics were added or substituted in 1913.

if any, being thus spread or streaked on the paper so as to become more (evidenced) *apparent*. The loose dust may then be blown off, and the paper examined by means of a simple lens (or reading glass) magnifying $7\frac{1}{2}$ diameters. In distinguishing these particles and streaks bright light is essential.

The crushed leaf in either black or green tea appears in such quantity that there is no chance of mistaking the leaf for coloring or facing material.

This test is performed in comparison with the standard, and if the tea is clearly equal to the standard as regards coloring or facing matter, the operation need not be repeated. If (several) particles of coloring or facing are found in the sample under comparison with the standard, this operation should be repeated a sufficient number of times for the examiner to satisfy himself as to whether or not the tea is in fact equal thereto. If found not equal to the standard, *samples should be drawn from packages representing at least 5 per cent of the line in question and subjected to the above test, and if a majority of these samples are below the standard, a test sheet of the tea in question should then be sent to the local appraiser's chemist or to the nearest pure-food laboratory of the Department of Agriculture for identification of the coloring or facing matter disclosed. As soon as the coloring or facing matter is identified, then the tea should be rejected.*

The above test is to be applied to all varieties of tea.

In the case of *Japans and all other green (unfermented) (tea) teas*, in addition to the above white-paper test, repeat the operation in comparison with the respective standard on semi-glazed black paper for facings, and if it is not equal to the standard *additional samples should be drawn and tested as provided above in the test on white paper, and if found below the standard*, the tea should be rejected *after the facing disclosed has been duly identified by the chemist*. This black paper test detects all facings like talc, gypsum, barium sulphate, clay, etc.

23. Should a tea prove on examination to be inferior to the standard in any one of the requisites, namely, quality, quality of infused leaf, or artificial coloring or facing, it shall be rejected, notwithstanding that it be superior to the standard in some of the qualifications. No consideration shall be given to the appearance or so-called style of the dry leaf.

ARGUMENT.

I.

The Tea Board is an independent, special tribunal, in whom is imposed by statute the specific duty of re-examining teas and determining whether such teas are equal or inferior in purity, etc., to Government standard teas. No other tribunal has the right to assume this duty. The complainants seek to have the court prescribe to the Tea Board what the Board shall regard as purity and as inferiority in purity. The complainants also seek to have the court prescribe to the Tea Board that they shall not use the Read test if they so choose. The Board deny that a bill in equity will lie, on this record and evidence, to restrain the use of the Read test.

The Board is a special and independent tribunal, made up of three General Appraisers (who are appointed by the President and confirmed by the Senate), designated to serve on this Board by the Secretary of the Treasury. The Board is not a part of the Treasury Department. The members of the Board are not subject to the orders of the Secretary of the Treasury, except so far as the statute provides. No regulation of the Secretary can control or direct the performance of any duty which the statute imposes on the Board themselves.

The statutory duties of the Board are to reexamine the teas and to decide whether in their opinion the teas are or are not inferior in purity, etc., to the standard teas.

The statute says (sec. 6) that

if such board shall *after due examination find*
the tea in question to be equal in purity,

quality, and fitness for consumption to the proper standards, a permit shall be issued to the collector for its release and delivery to the importer; but *if upon such final reexamination by such board* the tea shall be found inferior, etc. [Italics ours.]

It is the Tea Board, therefore, which shall make "*due examination*"; it is the Tea Board which shall "*find*" the question of inferiority or otherwise.

The complainants in their bill seek to have the court perform the duties of the Tea Board:

First, they ask the court to define for the board the word "purity" in the statute, and next to prescribe to the Board the method which the Board shall follow in determining the question of inferiority.

In their reply brief in the Circuit Court of Appeals, complainants' counsel urged the court to prescribe to the Board the following method:

Compare the general purity of the two, and not simply their freedom from color. Credit each for any superiorities to the other which it may show in the way of freedom from any particular impurity. In like manner debit each for inferiorities as to particular impurities. Decide the question of purity in favor of that one of the two which you find to contain the most tea and the least aggregate of foreign matter.

The Tea Board contend that the mere statement of the complainants' proposition shows its ridiculous-

ness. What is "the least aggregate of foreign matter?" Does four grains of gypsum, plus seven grains of dirt, plus one-tenth of a grain of coloring matter aggregate more or less than one grain of gypsum, plus one-fifth of a grain of coloring matter, plus one-tenth of a grain of arsenic?

The Tea Board contend that if Prussian blue is introduced into tea, whether in minute quantities or not, whether harmful to health or not, whether introduced for the purpose of disguising inferior grades of tea and giving them a better appearance or not, the Board may regard such Prussian blue as an impurity, regardless of the purpose or effect of the introduction; and further, that the Board have the sole right to decide what in their opinion shall constitute an impurity, and the sole right to determine what shall constitute inferiority in purity to the standard.

The complainants' witness, Chandler (R. 101), defined impurity as follows:

Anything which is not a natural integral part of the food might be said to be an impurity, although it would be perfectly harmless.

Complainants' counsel stated (R. 133) that he used the word "purity"—

always in the sense of absence of foreign matter, and I mean by that absence of matter other than that which is the chief constituent which constitutes the main body of the substance to be examined.

Dr. Sherman, a Government witness, stated that he concurred, but added that the word should also

"cover the question of exhaustion or partial exhaustion of tea leaves." (R. 133.)

These would seem to be very natural, logical, and legitimate definitions. If adopted by the Tea Board, there can be no doubt that the presence of Prussian blue in tea would constitute an impurity for which the Tea Board, by the statute, would be authorized to reject if the tea examined contained more of such impurity than the Government standard.

Second: Complainants ask the court to hold, in advance of action by the Tea Board, that the Board may not use the Read test, even if they choose, in ascertaining presence of coloring matter in teas. Much stress is laid by the complainants on the alleged invalidity of the regulations of the Secretary of the Treasury setting forth the Read test. The validity or invalidity of those regulations is perfectly irrelevant to this case. For the regulations, so far as they seek to control or direct the Tea Board in the performance of duties specially imposed on that Board by statute, are not binding. Nowhere in the record of this case is there the least particle of evidence that the Board consider themselves bound by these regulations. On the contrary, in their answer (R. 15, par. 4, par. 5, par. 6) the Board state that they intend to examine the teas only in accordance with the law and with the regulations made pursuant to the law, "and not otherwise." Therefore, there is no question in this case as to the regulations.

The only questions before this court are: May the Tea Board use the Read test if it chooses; and, on the record and evidence in the lower court, is there any ground for the maintenance of this bill in equity and the granting of the injunction prayed for?

The complainants' bill sets forth many allegations as to threats and intentions of the Tea Board to make the result of their examination of the teas depend upon, and to reject the teas by means of, the Read test (alleged to be illegal); and many allegations as to threats and intentions of the Tea Board to reject the teas if they contain any coloring or facing matter.

The record contains nothing to support these allegations.

The Tea Board have made no threats and have not announced their intentions with reference to these teas. The most that they can be said to have done is to state that they consider themselves to have a right, if they choose, to reject teas which contain in greater quantities than do the Government standard teas, the impurity known as coloring or facing matter, and a right, if they choose, to employ the Read test to ascertain the existence of this particular form of impurity.

The Tea Board contend, however, that the announcement of their views in general as to their rights under the statute can not afford a basis for injunction.

II.

The decision of the Circuit Court of Appeals is founded on an entire misconception of the issue, the record, and the evidence before the District Court at the trial, and misstates the contentions and admissions of the Government and of the Tea Board.

The Circuit Court of Appeals, per Lacombe, J., in reversing the decree of the District Court (224 Fed. 359), entirely misconceived and misconstrued the record, the issue, and the evidence which was before the lower court at the trial. It misstated the contentions of the Government in the case. This erroneous misunderstanding of the point at issue is responsible for its decision; and therefore it becomes the duty of the Government, at the outset of this argument, to point out in detail and with some elaboration the particular passages in the court's opinion which display the court's misconception of the record.

(a) The Court of Appeals states that (R. 233; 224 Fed. p. 361):

It is now contended for the Government that although the board may be satisfied that a certain lot of tea is fully equal, indeed superior, to the standard—in purity, in quality, and in fitness for consumption—the board must nevertheless reject it, if they find it contains coloring or facing matter.

This is a clear misstatement of the Government's contention. The Government contended at the trial and now contends that the Tea Board may decide

for themselves what constitutes an impurity; that they may, under the terms of the statute, decide that the presence of coloring matter in the tea in suit in excess of that in the Government standard constitutes an impurity for which they are entitled to reject such teas.

(b) The court says (R. 233; 224 Fed., bottom of page 361 and top of page 362):

The record shows that this tea is superior to standard in all three specified requirements.

As a matter of fact, the record shows nothing of the kind. It distinctly and specifically shows that this tea has more coloring matter than the Government standard tea (R. 144).

Moreover, we contend that the Circuit Court of Appeals had no power to make any such finding; and that superiority or inferiority to standard can be lawfully determined under the statute only by the Tea Board when they shall make the reexamination of the teas in accordance with the authority vested in them by law. The facts shown in the record in this case (whatever they may be) are not binding upon the Tea Board, for the simple reason that they are not facts found by the Board. The Board have not yet examined the teas. It is their statutory duty to make an examination and a finding of fact accordingly; and it is neither the Board's duty, nor within their power, to admit or reject tea upon the results of examinations made by other persons. What the record in this case may show is

as completely immaterial as anything could be; because no one, not even the members of the Board, can say in advance of the examination, whether their examination will reveal the same facts as shown in this case or what their opinion as to inferiority will be.

(c) The court proceeds to say (R. 233; 224 Fed. pp. 361, 362):

It also shows that nevertheless it will be rejected as soon as the board examines it, because of a fourth unspecified requirement.

The record shows nothing of the kind. It shows that, as the Board state in their answer, the Board intend, when they get a chance to act upon this tea (which they have not yet done), to act in accordance with the statute, viz, to reject it if, *in the opinion of the Board*, the tea is inferior to the Government standard in either purity, quality, or fitness for consumption, and that the Board will probably consider presence of more coloring matter than is contained in the Government standard as an impurity for which they are entitled to reject the teas.

(d) The court says (R. 233; 224 Fed. p. 362):

If the Government officers have no authority to reject teas *superior to the standard in all the requirements specified by law*, such rejection would be an invasion of the rights of complainants. * * * [Italics ours.]

This statement, prefaced by an "if," may be accepted as accurate. But the Tea Board does *not* intend, and the record so clearly shows, to reject

any teas "superior to the standard in all the requirements specified by law." They only intend to reject teas which they find to be inferior to the standard in *one* "of the requirements specified by law," viz, inferior in point of purity.

(e) The construction of the statute made by the court is erroneous, when it says (R. 233; 224 Fed. p. 361):

It does not seem to us that the statute warrants such rejection, unless the coloring matter *plus* other impurities makes the tea below standard in purity. * * * [Italics ours.]

The statute nowhere prescribes what shall constitute purity or impurity. It simply prescribes that the Board may not reject unless they find the teas inferior in purity to the Government standard. It leaves the decision as to what is purity and what is impurity entirely and exclusively to the Tea Board. The court's ruling practically amounts to this: Suppose there are four forms of impurity which may be present in tea called, respectively, A, B, C, D; suppose that the Government standard contains a large amount of impurity A, a small amount of impurities B and C, and none of impurity D (coloring matter); suppose the teas in suit contain a small amount of A, a large amount of B and C, and a small amount of D (coloring matter); under the court's decision, in order to reject the teas in suit, the Tea Board must find that the total amount of impurities in the Government standard, $A+B+C$, is less than the total amount of impurities in the teas in suit,

A+B+C+D. This, of course, is preposterous. The Tea Board may very possibly be of the opinion that impurity A, B, or C, is of no consequence, and that they will only consider the relative proportion of impurity D present in the teas in suit as compared with impurity D in the Government standard. If they so decide, how can this court decide that the Tea Board are wrong? How can this court substitute its own views of what constitutes a tea inferior in purity for the views of the Tea Board?

Complainant's counsel in their brief in the Circuit Court of Appeals talked about comparing "the general purity of the two," i. e., of their teas and of the standard. But what is general purity, and who is to decide it? Suppose a tea has some gypsum, some coloring matter, and some arsenic in it, and another tea has no gypsum, no coloring matter and more arsenic; which of the two has the greater general purity? Can this court instruct the Tea Board to find that the tea which contains only arsenic is the superior tea because it also contains no gypsum and no coloring matter?

(f) The court says (R. 233; 224 Fed., p. 362):

The members of the board are appointed by the Secretary (of the Treasury) who has the power to remove them; it is not disputed that they will act in conformity to the requirements he has prescribed for their guidance in Regulations 22 and 23.

Again (R. 234; 224 Fed. p. 362), the court says:

The teas * * * have been once rejected and, unless the injunction be granted, they will inevitably be again rejected, with

the result that they must be removed from this country or destroyed. There is no ground for the contention that the application is premature, on the theory that non constat what is shown the board may finally admit the teas; the record establishes the converse of this proposition. * * * That they intend to follow the directions of Regulations 22 and 23 is undisputed.

The statement that "the members of the board are appointed by the Secretary of the Treasury" is inaccurate and misleading. The board consists of "three United States general appraisers." Such general appraisers, to the number of nine, are *appointed* by the President and confirmed by the Senate, under the act of June 10, 1890, c. 407, sec. 12 (26 Stat., 131), as amended by the act of May 27, 1908, c. 205, sec. 3 (35 Stat., 403), and by the act of August 5, 1909, c. 6, sec. 28 (36 Stat. 11). From these nine general appraisers the tea act authorizes the Secretary of the Treasury to "*designate*" a special board of three to perform the special functions imposed by the tea act, which act gives the Secretary of the Treasury no power to remove general appraisers.

Further, if the above statements of the court mean that the Tea Board consider themselves bound to act in conformity with the Secretary of the Treasury's regulations, then the statement is most certainly disputed, for the Tea Board expressly stated in their answer (R. 15, par. 4) that they intend to examine the tea in accordance with the act of March 2, 1897, "and the regulations made pursuant

to authority therein granted, and not otherwise." Illegal regulations are not "regulations made pursuant to the authority" of the statute. Nothing else on this point has been conceded or admitted by the Tea Board.

The Board must protest against the imputation laid by the court that, since its members are appointed by the Secretary of the Treasury they will necessarily, as a matter of self-preservation, follow all the Secretary's regulations, legal or illegal. As pointed out (*supra*), the members of the Board are not "appointed" by the Secretary. They are members of the Board of General Appraisers appointed by the President, and designated by the Secretary to perform the specific duties imposed by the statute. The published decisions of the Board are a refutation of the court's comment (T. D. 32959; G. A. 7404; T. D. 33087; G. A. 7416).

The so-called concession of counsel for the Tea Board, quoted by the Circuit Court of Appeals (R. 233; 224 Fed. 362), appears at page 79 of the record. Reference to this page 79 will clearly show that the statement of counsel was made in connection with an entirely different point from that on which the Circuit Court of Appeals cites it. The District Court judge was asking counsel whether the Tea Board intended to exclude tea which contained coloring matter, regardless of the purpose for which or the manner in which the coloring matter was introduced into the tea, and the Government counsel replied that such was the Board's intention.

In order to show how the Circuit Court of Appeals misconstrued the record and the issue, it may be well to point out that the second quotation from the record made by that court (R. 233; 224 Fed. 362) as follows:

also that the teas will be rejected "if the said teas are found to contain matters adapted for use as coloring or facing of any kind or in any quantity, irrespective of whether the same is or is not used or applied so as to conceal damage or inferiority"

was a quotation from a statement made by the *plaintiff's counsel*, Mr. Choate, and not by the Government counsel—although the District Judge followed it by saying "Mr. Wemple says that is all true." (R. 79, 80.) But even if the Tea Board's position was as stated by Mr. Choate, this admission or concession was not a concession that they would act in any manner other than in conformity with the statute; for the statute does not prescribe that the impurity must be found to exist for any particular purpose.

(g) The court says (R. 234; 224 Fed. pp. 232, 233):

In our opinion these regulations are inconsistent with the statute, because they undertake to direct the board to reject tea which contains any coloring matter although the board may be convinced as the result of all the tests they apply that the coloring matter is present in such harmless quantities that the tea is not inferior to the statutory standards in purity, quality, or fitness for consumption.

The finding of the court that the Treasury regulations were inconsistent with the statute was totally irrelevant to the case. If illegal, the regulations were not binding on the Tea Board on matter which the statute committed to their independent judgment.

To sum up, the Board's view is, and always has been, that their duties are defined by the statute; and that where a regulation of the Secretary of the Treasury does not comport with the statute, the Board may decline to follow it. The Board may, however, legally find as a fact that the presence of any coloring matter in imported tea is so serious a matter as to render such tea in the opinion of the Board inferior in purity to the standard, and their finding in that respect, as to any particular tea, is to be final and can not be controlled in advance or subsequently reviewed by the courts.

III.

The bill should be dismissed because no facts are alleged which warrant the intervention of a court of equity. The complainants have a complete and adequate remedy at law.

The bill fails completely to allege any facts to justify a court of equity in taking jurisdiction of the cause, still less to warrant the extraordinary remedy of injunction.

(a) There is nothing to show that the complainants have not a complete and adequate remedy at law. An injunction is not sought to prevent multiplicity of suits; the teas in question have a readily

ascertainable market value. If the Tea Board, upon the reexamination of the teas in suit, should prohibit their importation and the complainants should deem themselves injured, they have their remedy at law.

(b) It is alleged in Paragraph XIV of the bill (R. 8) that the rejection of said teas—

has caused in the past, and will necessarily in the future cause, your orators damages difficult, if not impossible of computation not only in the losses occasioned by the inability to carry out their contracts for the sale of said illegally rejected teas, but also by the loss of customers, who, being unable to secure delivery of teas which they have ordered from your orators, have canceled in the past, and will necessarily in the future, cancel their contracts with your orators and purchase such teas as they require from the competitors of your orators.

These allegations are entirely insufficient to justify a court of equity in taking jurisdiction. It is unheard of that damages caused by breach of a contract for the sale of an article of known market value can not be fixed in a suit at law.

It is impossible to take seriously the allegations about loss of customers and the resulting prosperity of the complainants' competitors. Such competitors are equally subject to the tea law, and the teas that they seek to import must pass the same tests as the teas of complainants, and must, in precisely the same manner, receive the approval of the tea-examining officers of the Government. There is no discrimination in favor of the complainants' competitors.

Finally, there is absolutely no evidence in the record to support these allegations.

The only thing in the record on the subject of damage appears to be the following (R. 112):

Mr. CHOATE. As I understand, Mr. Wemple, you are prepared to admit the allegations of paragraph 16 of my bill of complaint, to the effect that if the defendants be permitted to examine the said teas by the said illegal method, the damage which may result to the complainants under the several matters herein-before alleged will exceed the sum of \$3,000?

Mr. WEMPLE. As far as being a fact is concerned, I admit it; I do not admit its relevancy.

Mr. CHOATE. I think that is all. The complainants rest.

(c) It is further alleged in paragraph XV of the bill (R. 9) that—

the said illegal rejections * * * have also in the past, and will necessarily in the future, injure the business credit and good name of your orators to an extent and in a manner which can not be compensated by the recovery of damages at law.

There is no evidence to support this allegation. Nor are any facts alleged in the bill to show just how the fair name and business credit of the complainants will be injuriously affected. If the allegation be true it is a necessary consequence of the operation of the tea law, which was enacted not for the benefit of the importers, but to protect the public. Importers of tea are all in the same boat. The best way for an

importer to protect his good name is not to import teas which are inferior to the standards either with respect to coloring matter or in other particulars.

(d) One other allegation is made for the purpose of beguiling a court of equity into taking jurisdiction. It is alleged in Paragraph XIII of the bill (R. 8) that the complainants will necessarily suffer irreparable injury through the rejection of the teas in suit. Of just what the irreparableness consists is left to the imagination, for no facts are alleged in the bill or introduced in evidence to show how or why irreparable injury will result. A cause of action in equity can not be supported by mere say-so. The record is a blank as far as proof of any of these allegations is concerned.

But we need not resort to extended argument either upon this matter of irreparable injury or the alleged inadequacy of the legal remedy, for both questions have long since been definitely settled by this court against the contention of the complainants, in *Cruickshank v. Bidwell* (1900) 176 U. S. 73 (affirming 86 Fed. 7), in which it was said (pp. 80, 81):

Complainants sought by this bill to enjoin an officer of the United States from the discharge of duties expressly imposed upon him by an act of Congress on the ground of its unconstitutionality. *We are clear that its averments did not justify such an interference with executive action.*

* * * * *

Inadequacy of remedy at law exists where the case made demands preventive relief, as,

for instance, the prevention of multiplicity of suits, or the prevention of irreparable injury.

* * *

But this bill does not aver, nor does it appear, that there would be any multiplicity of suits if complainants were left to their remedy at law.

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The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the court can reasonably infer that such would be the result.

[Italics ours.]

The averment of irreparable injury in the case at bar fails completely to fulfill this test. And there is no averment of multiplicity of suits.

We submit that, on the authority of *Cruickshank v. Bidwell*, just stated, the bill was properly dismissed by the District Court. If there is no jurisdiction in equity to restrain the enforcement of the tea act on the ground of its invalidity, we are unable to perceive how such jurisdiction can be exercised to restrain, in advance, an alleged illegal course of procedure under the very same act (since held constitutional in *Buttfield v. Stranahan* (1904) 192 U. S. 470), by the officers entrusted with its enforcement, in a case where the allegations of irreparable injury and inadequacy of legal remedy are just as defective as they were in the *Cruickshank* case.

That there is an adequate remedy at law, the existence of which bars the right to seek equitable

relief, is equally plain upon authority. The Revised Statutes provide (Sec. 723) that:

Suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate and complete remedy may be had at law.

As remarked by Mr. Justice Bradley in *New York Guaranty Co. v. Memphis Water Co.* (1882), 107 U. S. 205, 214, this provision "certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts."

The case of *Sang Lung v. Jackson* (1898) 85 Fed. 502, is equally in point in this connection, in which the court said (p. 534):

It is undoubtedly true that such general allegation in a bill of complaint is not of itself sufficient to show that a plaintiff will suffer irreparable injury, if some threatened action of a defendant is not enjoined. * * * In my opinion, the facts do not show that complainants would sustain irreparable injury if the defendant should destroy the tea referred to in the bill, as damages would be an adequate compensation for any loss which either of the complainants might sustain by reason of its destruction.

Until the decision of the Circuit Court of Appeals for the Second Circuit, in the case at bar, the law as laid down in *Sang Lung v. Jackson*, just stated, and by this court in the *Cruickshank* case, supra, was

perfectly clear. There was not a cloud upon the judicial horizon. Not only does the decision of the Circuit Court of Appeals in the case at bar conflict with the cases cited, but it is inconsistent with the prior pronouncement of the same court in *Macy v. Loeb* (C. C. A. 2d Cir. 1913), 205 Fed. 727, 729.

IV.

The bill should be dismissed because, even if it be assumed that it states a good cause for relief in equity (which the Government denies) the complainants have utterly failed to prove the allegations of the bill as to threatened acts of the respondents.

The bill in equity is based chiefly on an alleged threatened action by the complainants as set forth in paragraphs V, VI, VII, VIII (R. 3, 4, 5).

The respondents, the Tea Board, in their answer denied these allegations as follows (R. 15, par. 4, 5, 6):

4. As to paragraph 5, the respondents say that when teas are brought before them for final reexamination, it is their duty to, and they do in fact in every case, reexamine the same in accordance with the law as found in the act of March 2, 1897, and the regulations made pursuant to authority therein granted and not otherwise. Each allegation in paragraph 5 not covered by this admission is denied.

5. As to paragraph 6 of the bill, the respondents deny each allegation therein contained; but state that they have heretofore and will hereafter finally reexamine all teas duly brought before them in accordance with the law as hereinabove defined, and not otherwise.

6. As to paragraphs 7 and 8 of the bill, the respondents deny each and every allegation therein, except so far as such allegations are identical with the statement made in the paragraph next above.

The complainants at the trial introduced no evidence whatever to sustain their said allegations, so denied by the Tea Board. They did not call as witness any member of the Tea Board; and the only witnesses introduced by the complainants were William Dallas, an employee of the complainants (R. 26-41); Henry C. Thorn, a tea broker (R. 41-50); Joseph A. Dezhucé, a consulting chemist (R. 51-95); Charles F. Chandler, an expert chemist (R. 95-112). All these witnesses testified only to the usages of the tea trade and the nature of the Read test.

The court stated that it took judicial notice of the Treasury Decisions (R. 50).

The respondents' counsel admitted the fact that the damage which may result to the complainants "will exceed the sum of \$3,000" (R. 112).

This was all the evidence introduced by the complainants; and thereupon they rested their case.

Just before the arguments, the complainants asked leave to insert in the record a concession that "no form of examination or test was known to the tea trade, prior to the introduction of the Read test, except the cup test as described by Mr. Dallas and other witnesses, and the visual examination of the dry leaf" (R. 182).

Clearly the bill should be dismissed for failure of proof.

V.

The right to determine whether an imported tea is inferior to standard in the particulars specified by the tea act on account of the presence of coloring matter, or for any other reason, is conferred by that act upon the Tea Board exclusively, and a court has no power to perform the functions of that Board by deciding the question.

The main argument of the complainants and the theory upon which their case rests, is that under the tea act imported tea can not be rejected because it contains coloring matter if in other particulars it is superior to the standard. In other words, their contention is that, to determine relative "purity," the total impurities of all kinds in the imported tea must be compared with the total impurities contained in the standard. The impracticable and preposterous character of this theory has been adverted to on pages 13-15, 20-21, of this brief.

We are unwilling, however, to discuss further either the merits or demerits of this contention, because it begs the real question, which is: Whether inferiority to standard is to be determined by the Tea Board or by the courts. Whether a tea is or is not inferior to standard in purity, is a question of fact, the final decision of which is, under the statute and the decisions of this court, exclusively for the Tea Board. It is so clearly and obviously a question of fact that no amount of argument can make it otherwise. A tea comes before the Board for examination. The Board finds as a fact that it contains coloring matter. It finds further as a

fact that because of the presence of that coloring matter the tea is inferior in purity to the Government standard. The Board's decision upon the facts may or may not be correct. But that is not a matter for a court to determine. Upon this point the full and able opinion of the District Court leaves nothing more to be said. Judge Hough disposed of the whole case when he aptly remarked that a public official "can never be judicially told how to think." (215 Fed. 461.) See especially *Sang Lung v. Jackson* (1898), 85 Fed. 502.

Lem Moon Sing v. U. S. (1895), 158 U. S. 538;

Johnson v. Towsley (1871), 13 Wall. 72, 83;

Louisiana v. McAdoo (1914), 234 U. S. 627, 633;

In re Day (1886), 27 Fed. 678.

The opinion of the court in *Sang Lung v. Jackson*, *supra*, is so pertinent and so clearly sets forth the principles by which the appellants conceive the case at bar to be governed that we take the liberty of quoting from it at some length (pp. 506-507):

* * * The power to determine the ultimate questions of fact in relation to the quality, purity, and fitness for consumption of tea sought to be imported, when compared with the established standards, was one which from necessity must be lodged somewhere, and it would seem that, in the law in question, ample provision has been made to secure a proper determination of these questions, and thus to carry out the manifest purpose and

object of the statute without injustice to the importer. In my opinion, the decision of the Board of General Appraisers, provided for by the act, is not the subject for review by the courts upon any allegation of mistake either of law or fact. The duty of finally determining the facts upon which the right of the importer to have this class of merchandise admitted into the United States depends, is imposed upon that board, and this case must, therefore, be governed by the general rule of law that, where the determination of facts is lodged in a particular officer or tribunal, the decision of that officer or tribunal is conclusive, and can not be reviewed, except as authorized by law. This is a familiar rule, and is sustained by a uniform line of authorities. * * *

In *Macy v. Loeb* (C. C. A., 2d Cir., 1913) 205 Fed. 727, 729, Judge Lacombe, delivering the opinion of the court, said with reference to the tea act:

They (the complainants) also contend that the act does not apply to teas equal to or above standard; that such teas are not prohibited and may be imported without being affected by the act. This is a mistaken idea. The act provides, in substance, that *no tea* shall come here unless it meets the requirements of the statute—that is, unless it can secure a finding either from the examiner or from the Board of General Appraisers that it is, *in their opinion* up to standard. *Unless an importation of tea can secure such a finding it must be taken away, even though it be the highest grade of brick tea that ever left China by caravan.* [Italics ours.]

We are at a loss to understand how, holding these views, the same judge, only two years later, could have delivered the opinion he did in the case at bar.

To see that the court is asked to substitute its judgment for the judgment which the statute requires the Tea Board to exercise, it is only necessary for this Court to consider the precise injunction for which the complainants pray.

They ask (R. 10, bill, Par. XIX) that the Tea Board be restrained from examining the teas by the Read test and, "in general, from examining the said teas in any other manner than as required by statute."

Such a prayer for injunction simply amounts to asking the court to instruct the Tea Board to do their duty, before the Tea Board are given a chance to act upon the tea in question in accordance with the statute and before the complainants know whether or not the Tea Board will ultimately approve or reject their teas.

VI.

The Read test is lawful. The tests named in the statute are not exclusive. Even if they are, the Read test is either a visual inspection test or a chemical analysis or a combination of both.

The District Court at the trial stated (R. 137, 138) that—

the complainants' testimony has admitted that, provided the coloring matter be not in intimate union with the tea, and if the particles of coloring matter be, microscopically speaking,

large, that the test or method provided in section 22 does reveal the presence of such coloring matter. * * * I consider that established beyond all question.

We start, therefore, with the proved fact that the Read test is effective to establish the presence of coloring matter in the tea. It is also incontrovertible that whether coloring matter in tea does or does not constitute an impurity, was a matter solely for the Tea Board and not for the courts to decide. The Tea Board, in order to decide whether a given tea is impure, have a right to establish for themselves what elements they will consider to constitute purity or impurity. As the District Court said at the trial (R. 132):

Impurity presupposes, no matter to what object the word may be applied, a departure from standard.

(See also R. 141, 142.)

The Tea Board have also a right to determine the existence of such impurity, by any method they choose which is not prohibited by any law.

(a) Statutory tests not exclusive.

At the threshold of the case attempted to be made out by the bill, is the assumption that in examining teas the Tea Board is limited in its procedure (a) to tests made "according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water;" and (b) to "chemical analysis." The theory is that as these are the only

methods mentioned in section 7 of the tea act they are the only ones which the Tea Board may legally use.

It is an unwarrantably narrow view to take of the board's functions under the statute. The precise phraseology used in section 7 is this:

In all cases of examination or reexamination of teas, or merchandise described as tea, by examiners or boards of United States general appraisers under the provisions of this act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

There is nothing whatever to show that the methods of examination set forth were intended to be exclusive. The Board is required to test teas according to the usages of the tea trade, including infusion in boiling water (the "cup test" described in the evidence), and, if the Board thinks necessary, they may resort to chemical analysis; *but there is nothing whatever in the statute, either express or implied, which prohibits the examiners or the Tea Board from using other tests in addition to those required.* The provision must be construed in the light of the obvious purpose of the act, which is that the Board shall exclude teas which they find to be inferior to the standards in any of the specified requirements. The methods specifically required are incidental to the main purpose. The usages and customs of the tea trade in the examination of teas can be at best but rough-and-ready tests

(such as the cup test described in the evidence) evolved from the practical experience of tea dealers, and they are not in any sense scientifically accurate. They are not rigid; for like all customs they are likely to change from time to time. If skilled scientists invent superior methods for accurately determining the composition of tea and for detecting and identifying foreign substances found with tea in its commercial form, must it be said that the tea examining officers can use only the old rough-and-ready archaic methods? Can they not take advantage of modern discoveries? We submit that Congress could not have intended any such unreasonable limitations.

If we are right in our construction, the argument that the Read test is illegal falls to the ground, since, as already pointed out, it is founded in its entirety upon the theory that the tea examining officers are limited by the act to the usages and customs of the tea trade which were current before the discovery of the Read test, and to chemical analysis.

And, of course, if the Board may, in addition to the tests required by the statute, adopt a new test in examining tea, the question whether the Secretary of the Treasury can compel the Board to use it is immaterial. If the Board *might* use it on their own initiative, they certainly can not be enjoined from doing so solely because the Secretary of the Treasury has without authority asked or directed or ordered them to use it. If the Board have a legal right to do a thing, it does not become illegal for them to do it, because

some one has unwarrantably requested or ordered them to do it.

- (b) The Read test is merely a different method of visual inspection and is therefore essentially according to the usages and customs of the tea trade.

Visual inspection of tea has always been a recognized mode of examination according to the usages and customs of the tea trade (Dallas, R. 26, 27).

The Read test provides a more refined method of visual inspection. By pressing and rubbing the sifted tea upon paper, the particles of color or facing material become impressed upon the paper in the form of visible marks. The test is still a visual inspection. It is a modification in method, but not in principle, of existing usages in the trade.

- (c) The Read test in its complete present form is chemical analysis, or a combination of visual inspection and chemical analysis.

The testimony of the experts conflicts as to whether the Read test is or is not "chemical analysis." That it is chemical analysis, see the testimony of Cameron (R. 117, 122); Sherman (R. 125). That it is not, see the testimony of Chandler (R. 98, 103); Deghuée (R. 61, 62); but even Dr. Deghuée admits that the Read test involves a chemical analysis of coloring matter found in tea (R. 77, 81). All the experts except Dr. Chandler seem to agree that after the color has once been separated by being pressed upon a piece of paper its identification by a chemist involves chemical analysis, or at least a chemical test. Dr. Chandler testifies that this is not *necessarily* true, because it might be possible for the chemist to

identify the color by mere inspection and that this would not be chemical analysis (R. 98, 103). He is contradicted on this point by Dr. Cameron (R. 122, 123).

The burden is upon the complainants to prove by a preponderance of the evidence that the Read test is not chemical analysis. In view of the marked conflict in the testimony, we submit that the complainants have failed to prove their point. Certainly the identification of a particular coloring matter by a chemist is a chemical conception; and whether or not it necessarily involves the use of chemical reagents, it is certainly, in the broad sense, a chemical analysis of the coloring substance. Since it necessitates the separation and chemical identification of a constituent part of the commercial article known as tea, it is also to that extent a chemical analysis of that tea, in the sense in which the words chemical analysis are ordinarily understood, i. e., as a process by which the component parts or elements of a particular article, material, or substance are determined. This is amply borne out by the definitions in the standard dictionaries:

WEBSTER'S NEW INTERNATIONAL DICTIONARY.

Analysis.

1. A resolution of anything, whether an object of the senses or of the intellect, into constituent parts or elements; an examination of component parts, separately, or in their relation to the whole, as the words which compose a sentence, the tones of a tune, or the simple propositions which enter into an argument.

2. *Chemical*. (a) The separation of compound substances, by chemical processes, into their constituents. (b) The determination, which may or may not involve actual separation, of one or more ingredients of a substance either as to kind or amount; also, the tabulated result of such a determination. Determination of the nature of the ingredients is called *qualitative analysis*; of their quantity, *quantitative analysis*.

Chemical.

1. Of or pertaining to chemistry * * * ; characterized or produced by the forces and operations of chemistry; as, *chemical* changes, *chemical* combinations.

NEW STANDARD DICTIONARY:

Analysis—

1. The resolution of a compound into its parts or elements; the act of ascertaining, separating, or unfolding in order the elements of a complex body, substance, or treatise: opposed to synthesis.

4. *Chem*. The determination of the elements of a compound, the proportions of the constituents, the proportion of a special ingredient, or the presence of impurities or adulterations.

Chemical.

1. Of or pertaining to chemistry, its phenomena, laws, operations or results; as, *chemical* analysis.

2. Obtained by or used in a process of chemistry; as *chemical* paper.

Chemical analysis is either (1) *qualitative*, embracing (a) the wet method and (b) the dry

method called blowpiping; or (2) *quantitative*, embracing (a) *gravimetric*, which includes the wet method and the dry method called assaying; and (b) *volumetric*, which treats either solutions or gases (endiometry).

CENTURY DICTIONARY ENCYCLOPEDIA:

Analysis.

1. The resolution or separation of anything which is compound, as a conception, a sentence, a material substance, or an event, into its constituent elements or into its causes.

Chemical.

1. Pertaining to chemistry; as a *chemical* experiment.

2. Pertaining to the phenomena with which chemistry deals and to the laws by which they are regulated; accordant with the laws of chemistry.

Chemical analysis.

The resolution of complex bodies into their elements. It is either qualitative or quantitative. Qualitative analysis consists in the determination of the component parts, merely as respects their nature and without regard to their relative proportions. Quantitative analysis consists in the determination of the relative amounts and proportions of the components.

Blowpipe identification with a borax bead is a well-known method of chemical analysis. Every chemist uses it or has used it at some time in making chemical analyses. Yet in principle it is quite similar to the Read test. It simply identifies a par-

ticular substance by the color imparted to the bead of borax when fused in the flame of the blowpipe.

It is submitted that the Read test is a chemical analysis or that, at least, it is a combination of visual inspection and chemical analysis of the commercial article known as tea, and is therefore expressly authorized by the tea act.

CONCLUSION.

It is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed and the bill dismissed (1) for failure of proof of the allegations of the bill; (2) for failure of the bill to set forth any grounds for relief in equity; (3) for lack of jurisdiction in the court to enjoin the Tea Board as prayed; (4) for failure of the bill to set forth any proposed acts of the Tea Board which are in violation of the statute; (5) for the reason that the Tea Board have a right, if they so choose, to reject tea for impurity, if it contains coloring or facing matter in excess of the amount contained in the Government standard teas; (6) for the reason that the Tea Board have a right, if they so choose, to employ the Read test in ascertaining the particular form of impurity consisting of coloring or facing matter.

CHARLES WARREN,
Assistant Attorney General.

MARCH, 1918.

APPENDIX A.

Act of March 2, 1897, c. 358 (29 Stat., 604), "An act to prevent the importation of impure and unwholesome tea."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after May first, eighteen hundred and ninety-seven, it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards provided in section three of this Act, and the importation of all such merchandise is hereby prohibited.

SEC. 2. That immediately after the passage of this Act, and on or before February fifteenth of each year thereafter, the Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; that vacancies in the said board occurring by removal, death, resignation, or any other cause shall be forthwith filled by the Secretary of the Treasury by appointment, such appointee to hold for the unexpired term; that said board shall appoint a presiding officer, who shall be the medium of all communications to or from such board; that each member of said board shall receive as compensation the sum of fifty dollars per annum, which, together with all necessary expenses while engaged upon the duty herein provided, shall be paid out of the appropriation for "expenses of collecting the revenue from customs."

SEC. 3. That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom-houses of the ports of New York, Chicago, San Francisco, and such

other ports as he may determine, duplicate samples of such standards; that said Secretary shall procure a sufficient number of other duplicate samples of such standards to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

SEC. 4. That on making entry at the custom-house of all teas, or merchandise described as tea, imported into the United States, the importer or consignee shall give a bond to the collector of the port that such merchandise shall not be removed from the warehouse until released by the collector, after it shall have been duly examined with reference to its purity, quality, and fitness for consumption; that for the purpose of such examination samples of each line in every invoice of tea shall be submitted by the importer or consignee to the examiner, together with the sworn statement of such importer or consignee that such samples represent the true qualities of each and every part of the invoice and accord with the specifications therein contained; or in the discretion of the Secretary of the Treasury, such samples shall be obtained by the examiner and compared by him with the standards established by this Act; and in cases where said tea, or merchandise described as tea, is entered at ports where there is no qualified examiner as provided in section seven, the consignee or importer shall in the manner aforesaid furnish under oath a sample of each line of tea to the collector or other revenue officer to whom is committed the collection of duties, and said officer shall also draw or cause to be drawn samples of each line in every invoice and shall forward the same to a duly qualified examiner as provided in section seven: *Provided, however,* That the bond above required shall also be conditioned for the payment of all custom-house charges which may attach to such merchandise prior to its being released or destroyed (as the case may be) under the provisions of this Act.

SEC. 5. That if, after an examination as provided in section four, the tea is found by the examiner to be equal in purity, quality, and fitness for consumption to the standards hereinbefore provided, and no reexamination shall be de-

manded by the collector as provided in Section six, a permit shall at once be granted to the importer or consignee declaring the tea free from the control of the customs authorities; but if on examination such tea, or merchandise described as tea, is found, in the opinion of the examiner, to be inferior in purity, quality, and fitness for consumption to the said standards the importer or consignee shall be immediately notified, and the tea, or merchandise described as tea, shall not be released by the custom-house, unless on a re-examination called for by the importer or consignee the finding of the examiner shall be found to be erroneous: *Provided*, That should a portion of the invoice be passed by the examiner, a permit shall be granted for that portion and the remainder held for further examination, as provided in Section six.

SEC. 6. That in case the collector, importer, or consignee shall protest against the finding of the examiner, the matter in dispute shall be referred for decision to a board of three United States general appraisers, to be designated by the Secretary of the Treasury, and if such board shall, after due examination, find the tea in question to be equal in purity, quality, and fitness for consumption to the proper standards, a permit shall be issued by the collector for its release and delivery to the importer; but if upon such final reexamination by such board the tea shall be found to be inferior in purity, quality, and fitness for consumption to the said standards, the importer or consignee shall give a bond, with security satisfactory to the collector, to export said tea, or merchandise described as tea, out of the limits of the United States within a period of six months after such final reexamination; and if the same shall not have been exported within the time specified, the collector, at the expiration of that time, shall cause the same to be destroyed.

SEC. 7. That the examination herein provided for shall be made by a duly qualified examiner at a port where standard samples are established, and where the merchandise is entered at ports where there is no qualified examiner, the examination shall be made at that one of said ports which is nearest the port of entry, and that for this purport samples of the merchandise, obtained in the manner prescribed by section four of this Act, shall be forwarded to

the proper port by the collector or chief officer at the port of entry; that in all cases of examination or reexamination of teas, or merchandise described as tea, by examiners or boards of the United States general appraisers under the provisions of this Act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

SEC. 8. That in cases of reexamination of teas, or merchandise described as teas, by a board of United States general appraisers in pursuance of the provisions hereof, samples of the tea, or merchandise described as tea, in dispute, for transmission to such board for its decision, shall be put up and sealed by the examiner in the presence of the importer or consignee if he so desires, and transmitted to such board, together with a copy of the finding of the examiner, setting forth the cause of condemnation and the claim or ground of the protest of the importer relating to the same, such samples, and the papers therewith, to be distinguished by such mark that the same may be identified; that the decision of such board shall be in writing, signed by them, and transmitted, together with the record and samples, within three days after the rendition thereof, to the collector, who shall forthwith furnish the examiner and the importer or consignee with a copy of said decision or finding. The board of United States general appraisers herein provided for shall be authorized to obtain the advice, when necessary, of persons skilled in the examination of teas, who shall each receive for his services in any particular case a compensation not exceeding five dollars.

SEC. 9. That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this Act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition.

SEC. 10. That the Secretary of the Treasury shall have the power to enforce the provisions of this Act by appropriate regulations.

SEC. 11. That teas actually on shipboard for shipment to the United States at the time of the passage of this Act

shall not be subject to the prohibition hereof, but the provisions of the Act entitled "An Act To prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, shall be applicable thereto.

SEC. 12. That the Act entitled "An Act to prevent the importation of adulterated and spurious teas," approved March second, eighteen hundred and eighty-three, is hereby repealed, such repeal to take effect on the date on which this Act goes into effect.

Approved, March 2, 1897.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1917.

HYRON S. WAITE, ISRAEL F. FISCHER AND HENDERSON M.
SOMERVILLE, as GENERAL APPEAERS DESIGNATED BY THE SECRETARY
OF THE TREASURY of the BOARD OF TEA APPEALS, APPELLANTS,

GEORGE H. MACY, OLIVER C. MACY, GEORGE S. CLAPP, T.
RIDGWAY MACY AND IRVING K. HALL, DOING BUSINESS as CO-
MATHREAS UNDER THE NAME OF CARTER, MACY & COMPANY,

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

BRIEF FOR THE APPELLEES.

JOSEPH H. CHOATE, JR.,
Counsel for Appellees.

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No. 255.

Supreme Court of the United States,

OCTOBER TERM, 1917.

BYRON S. WAITE, ISRAEL F. FISCHER, and HENDERSON M. SOMERVILLE, as General Appraisers,
Designated by the Secretary of the Treasury
as the Board of Tea Appeals, Appellants,

V.

GEORGE H. MACY, OLIVER C. MACY, GEORGE S.
CLAPP, T. RIDGWAY MACY, and IRVING K.
HALL, doing Business as Copartners under the
Name of Carter, Macy & Company.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

BRIEF FOR THE APPELLEES.

Statement.

This is an appeal by the respondents from a decision of the United States Circuit Court of Appeals for the Second Circuit which reversed a decree of the United States District Court, dated August 15, 1914, dismissing the bill of complaint.

Facts.

The complainants (appellees) are importers of tea. The respondents (appellants) are members of the appellate board created by the Act of Congress of March 2, 1897, Chap. 358, 29 Stat. 604, as amended by Act of May 16, 1908, Chap. 170, 35 Stat. 163 (hereinafter referred to as the Tea Law), to re-examine teas already examined by the tea examiners appointed under the same Act. The function of these examinations and re-examinations is to determine whether or not teas offered for import comply with the requirements imposed by the Tea Law for admission into the United States.

Certain green teas of the complainants were offered by them for import, were rejected by the examiner, and are now before the appellants for re-examination, upon which the appellants' decision will be final and unreviewable in any court.

In re-examining the teas and deciding thereon, appellants threaten to adopt a method of examination, and to apply a criterion for judging the admissibility of the teas, neither of which is authorized by the Tea Law. The object of the suit was to secure an injunction restraining these unauthorized acts; and the decision appealed from grants the injunction asked in regard to the latter of the two matters referred to.

The Tea Law expressly prescribes the criterion by which teas offered for import are to be judged. It also prescribes the method of examination which is to be used, both in the examinations at the port and in the re-examinations by the appellate board. The first section of the Act provides that, to be admissible, teas offered for import must be equal in "purity, quality and fitness for consumption" to certain

standard teas which are annually designated by the Secretary of the Treasury. Quantities of these teas are purchased by the Department and placed in the hands of all examiners (including the appellants) to enable them to make the necessary comparison with teas offered for import. If equal to these standard teas in the three named respects, the proposed import is entitled to entry; otherwise not.

The method of examination is prescribed by section 7 of the Act, which requires that the "purity, quality and fitness for consumption" (of the teas in question) "shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water and, if necessary, chemical analysis."

By section 10 of the Act, the Secretary of the Treasury is given power to enforce the provisions of the Act by appropriate regulations. Assuming to act under this power the Secretary has issued regulations (T. D.'s 31367, 31368 and 33211) which direct all examiners, including of course the appellants, to reject all teas which upon examination prove to contain any coloring matter whatever. These regulations also require (Article 22 of T. D. 33211) that all examiners, likewise including the appellants, examine the teas (to test their purity) by means of the so-called Read test or Read method.

It is our contention that both of these regulations are not only unauthorized by law, but command the examiners to violate the law—indeed to act in exact opposition to its plain mandates. They direct the exclusion of teas which contain microscopic quantities of coloring matter without regard to their other contents, irrespective of whether or not such teas are, in fact, or in the

opinion of the examiners, superior in purity to the standards; and they require the use of a method of examination which is neither a method in accordance with the usages and customs of the tea trade, nor a method of chemical analysis. As these contentions depend on the construction of the Tea Law, it is necessary to state a number of facts in relation to the methods and history of the business governed by that statute.

Green teas are prepared in China at the points where they are grown. The preparation usually takes place in small establishments under the most unclean and unsanitary conditions imaginable (fol. 81). These conditions are such that all green teas contain relatively large quantities of matter which is not tea—foreign matter. In addition, many well known adulterants are from time to time found, such as leaves of other plants, exhausted leaves, imitation leaves, added tannin extract, catechu, as well as considerable quantities of clay, sand and organic filth (fols. 117, 390, 391). In addition to these impurities certain coloring matters, usually Prussian blue, indigo or ultramarine, and facing matters, such as plumbago or the like, are sometimes purposely applied to the leaves to improve their appearance. The coloring matters in question are insoluble and thus incapable of passing into the infusion, which is the only part of the tea which enters the human body (fol. 213). They are also harmless in themselves, in whatever quantity taken (fols. 300, 303). The commonest of them, Prussian blue, is recognized in the United States Pharmacopœia as having a medicinal value (fol. 419). In coloring teas, however, they are used in such minute quantities that even if they were virulent poisons, such as arsenic,

they would be harmless (fols. 214-5). The average intentionally colored tea will perhaps contain one part in 50,000, or 20 parts in 1,000,000, of the coloring matter used (fol. 160). On the other hand, the quantity of foreign matter, other than color, present in the average teas is enormously larger. In the government standards with which the teas in question were to be compared, 100 times as much, or an average of about 2,000 parts in a million, of foreign mineral matter alone were found (fol. 494). These standards are supposed to contain no color whatever, though in fact they do contain quantities which, microscopically speaking, are considerable, but in so finely divided a form as to escape the Read test (fol. 171). It is thus apparent that a standard tea, presumably colorless, may readily contain a quantity of total impurity greater than that present in a proposed import by vastly more than the amount of any possible color which the import might contain. The standard may be full of rubbish, while the import may contain practically no foreign matter other than a trace of color.

Until about 1911 substantially all green teas were and always had been colored to the extent described (fol. 512), and the prevalence of the practice was necessarily known to everyone who had any acquaintance whatever with the business, and to Congress. In spite of that fact, the Tea Law contains no reference to coloring or facing, nor does it contain any provision which makes or justifies any discrimination among the various forms of impurity commonly present in teas. Its sole requirement is that already quoted, that the proposed import shall be equal "in purity" to the standard tea. It protects the public against harm-

ful impurities by the requirement that the import equal the standard in "fitness for consumption".

Of late years the practice of coloring teas, at least for this market, has been largely abandoned (fols. 574-575). The teas, however, owing to the poverty of the Chinese growers, are prepared in the same utensils and on the same floors which were or still are used for preparing colored teas (fol. 118). The work is done in small huts full of the dust of ages (fol. 85). Under these circumstances accidental particles of color find their way into substantially all teas. Color enough to bring about the rejection of teas will often get into them merely from the use, as containers, of tins which have been used before (Appellants' witness Hazen, fol. 570). The amount of coloring matter for which teas are now rejected is so infinitesimally minute—as, for example, in the teas in question in which the complainant's chemist found less than one part in a million—that it cannot well have been intended to color the product, and must have been introduced accidentally. When thus accidentally introduced the coloring matter is, of course, present exclusively or chiefly in the dust, not on the leaf (fols. 527-8), and thus cannot affect or improve the appearance of the product.

The sole method of examining teas known to the customs and usages of the tea trade is what is called the cup test, which consists simply in placing an amount of tea equal in weight to a silver half dime in a clean cup with boiling water and examining the resulting infusion, the drawn leaves, the sediment (if any) in the cup, and the scum (if any) on the surface (fols. 124-6). This method furnishes a practical, though rough, means of determining the purity of teas, and of detecting the

presence of imitation and exhausted leaves, sand and excessive color or facing (fols. 521-2). Until 1911 no other method of examining teas was prescribed by the Treasury regulations or used by the examiners. In that year, however, a Treasury regulation was adopted requiring the use of a chemical analysis. In 1912 by a new regulation (T. D., 32322) this was superseded by the so-called Read test. By this method the dust from two ounces of tea, obtained by rubbing through a sieve of prescribed mesh, is placed upon white paper and rubbed into the paper with a spatula. The loose dust is then blown off and the resulting marks upon the paper are examined with a lens. Under this examination microscopic quantities of coloring matter may be detected, if not too finely divided, and if they are not so applied as to adhere firmly to the leaves. Minute particles of Prussian blue, indigo, or ultramarine which may be present in the dusts will be squeezed and spread by the spatula over the surface of the paper in such a manner as to be visible with the lens, or indeed, sometimes, to the naked eye. When the coloring matter is present in the tea in the form of microscopic particles in the tea-dust the use of this test will condemn teas containing as little as one part in two million of coloring matter (fol. 159). The test will not, however, show how much coloring matter the tea may contain, nor whether it contains more nor less than another tea (fols. 158, 325). It gives no information as to any other impurity (fols. 289, 369); and, as in the case of the Government standards examined by Dr. De Ghuée, which contained 600 particles of coloring matter, but showed nothing under the Read test, it will not show color if present in very finely

divided form, or if firmly applied to the leaves (fol. 171). This test, in a slightly altered form is prescribed by T. D. 33211, comprising the tea regulations for 1913, and applicable to the teas in question.

In making their re-examination the appellants have in all cases followed the regulations issued by the Secretary of the Treasury, and it cannot be disputed that they threaten to do so in re-examining the teas in question. It is expressly admitted by their counsel that they will reject these teas if they are found on examination by the Read method to show any color whatever (fols. 235, 237-8, 284).

This is the threatened conduct which the present suit was brought to restrain. The prayer of the bill is that the appellants be forbidden to obey the Treasury regulations which command that teas, even if found superior in general purity to the standard teas, be rejected if found to contain any color, and the corresponding regulations which require the use of the Read test. It also asks that by mandatory injunction the appellants be commanded to examine the teas in question in the manner required by law, and to apply to those teas the criterion which the statute establishes, and not that which the Treasury regulations prescribe—to determine, that is, whether in their judgment the teas in question are equal to the standards *in purity*, and not merely whether they are equal *in freedom from coloring matter*. We asked the court, not to constrain the judgment of the appellants in their official capacity, or to control their decision, but only to restrain them from carrying out their avowed intention of exercising their judgment under an incorrect construction of the statute, and to direct them to exercise it under a correct one. The

injunction granted leaves the appellants perfectly free to admit or reject the teas in question, and to decide entirely as they see fit the question of fact on which the admissibility turns. It simply construes the law, declares what powers are vested in the appellants and judicially defines the question which they are to decide.

The Read Test, in a form identical with that which the appellants threaten to use as the decisive factor in their examination of the teas, has been condemned as illegal by the tea-board itself. The predecessors of the appellants, acting in obedience to the Treasury regulations, made use, in their re-examinations, of the Read test as originally prescribed by the Treasury Regulations (T. D. 32322). The present complainants thereupon protested, and after a hearing the board decided (T. D.'s 32959 and 33087) that the test was illegal, being neither in accordance with the usages and customs of the tea trade nor a form of chemical analysis. The regulation requiring the test was then altered in an ostensible attempt to bring it within the literal meaning of the extremest possible definition of the phrase "chemical analysis", and in this altered form was promulgated in the present Treasury regulation T. D. 33211. The new form, however, as we shall show, left the result of an examination dependent on the results of precisely the same process as the old.

The teas in question (referred to in the testimony as Q. U. I. 5, Q. U. I. 6, and Q. U. I. 7) are of the highest possible grade, and cost the complainants four or five times as much as the average value of the corresponding standard teas (fols. 131-4). Their superiority to the standards in quality and fitness for consumption is undisputed. They were rejected solely for impurity and that impurity con-

sisted solely in the presence therein of color. According to the complainants' witness the amount of color present was in no case more than one part in one million (fol. 171). According to the appellants' witness, Dr. Pain (fols. 341-6), the amounts were respectively ten, twelve and nineteen parts in a million; but this was the result of a process containing so many elaborate steps that the possibility of error in dealing with such small quantities was so great as to discredit the conclusion. It is, however, undisputed that the total foreign matter present in these teas was vastly less than that present in the corresponding standard teas. The character of the teas in question is therefore such that they would presumably be rejected if examined in the manner and under the criterion which the appellants propose to use, but would presumably be admitted if examined under what we contend to be the conditions required by law. Our evidence to this effect was offered solely to establish the fact that we are were likely to be injured by the conduct sought to be restrained, and not to establish in such a way as to constrain the decision of the appellants, our right to bring the teas in.

The final rejection of the teas, if it occurs, will occasion to the complainants direct losses impossible to compute, and irreparable damage in the way of loss of contracts, customers, business credit, and reputation. These facts are alleged in paragraphs XII-XVI of the bill, were not questioned at the trial or in the Circuit Court of Appeals, and were apparently conceded, counsel having expressly admitted the facts alleged in paragraph 16 of the bill, a paragraph which stated the sum of the damage which will result "in the several manners hereinbefore alleged" (fol. 334). It is now for the first

time since the answer, which of course contained a formal denial of irreparable damage, contended that there is no proof of such damage. We believe that the irreparable character of the damage appears inevitably from the whole situation, but will discuss the proof hereinafter.

The learned trial court dismissed the bill substantially on two grounds: (1) that the application was premature, since it assumed that the appellants would commit an illegal act which they might possibly not commit; and (2) that the court lacked jurisdiction, because the statute had committed to appellants the entire question of whether or not proposed imports fulfil the requirements for admission.

The Circuit Court of Appeals reversed this decision, holding in accordance with our contention that though the Tea Law made the appellants the sole judges of the question of fact as to whether the teas in question were equal to the standards in purity, &c., it did not empower them to define their own jurisdiction by conclusively determining the construction of the statute; that the statute, properly construed, required the appellants in comparing the purity of teas offered for import with that of the standard, to take into consideration all forms of impurity, and therefore did not warrant rejection for color only, or for impurity consisting in color, unless the coloring matter plus other impurities made the import below the standard in purity, quality or fitness for consumption. Having thus decided, the court apparently declined to pass upon the propriety of the use of the Read test as the decisive factor in the examination. This was doubtless natural, as the test is obviously useless except for the enforcement of the rule condemned by the court.

POINT I.

The court had jurisdiction to grant the relief prayed.

The acts complained of and sought to be enjoined are wholly unauthorized acts, sought to be done by the appellants under color of statutory authority. The appellants and the Secretary of the Treasury have no power to interfere with the complainants' property, in any manner, except as they derive it from statute, and in this instance except as they derive it from the Tea Law. Every power which they seek to exercise must have its basis somewhere within the four corners of that act. The statute gives importers the right to have their teas examined in the prescribed manner, and to have them admitted to import if, when so examined, they fulfil, in the judgment of the examiners, the precise requisites imposed by law. If the appellants base their decision upon an unlawful method of examination, or impose unlawful requisites of admission, they infringe upon the rights given the complainants by the law. Indeed, if any proposed dealing of theirs with complainants' tea is not authorized by that statute, it is a wholly unlawful act. If prejudicial to the complainants, any such unlawful act, if threatened, is necessarily the proper subject of injunction. It is perfectly settled law that the Federal courts may enjoin such acts, and that there is nothing in the official character of the appellants which exempts them from the equity jurisdiction of the court or renders them immune from its injunctive processes.

Philadelphia Company v. Stimson, 223 U. S. 605.

American School of Magnetic Healing v. McAnnulty, 187 U. S. 94.

The illegality of the proposed acts will be pointed out in detail in subsequent portions of this brief, but for the purpose of discussing the jurisdiction it is sufficient to assume that the acts in question are not authorized by statute. If they are authorized, of course the complainants have no case in any event.

The appellants deny the jurisdiction of the court on the ground that the Tea Law has committed to an administrative tribunal exclusive power to decide all questions determining the admissibility of tea. They hold that in this respect the Tea Law is an example of the type of statute so often considered in immigration cases, particularly in the Chinese Exclusion cases.

It is respectfully submitted, however, that these statutes are widely different from the Tea Law. They do in terms commit to the immigration authorities not only the general administration of the law but also the actual decision of all questions upon which the admissibility of Chinese immigrants can turn, and they make that decision final. They prescribe no method of testing the qualifications of the applicant for admission, and they do in the most unmistakable terms express the intention of Congress to commit to the executive every power in the premises which can be lawfully delegated. For example, the statute under consideration in the *Japanese Immigrant Case*, 189 U. S. 86, provides that

"All decisions made by the inspection officers or their assistants touching the right of any alien to land when adverse to such right shall be final . . ." (p. 95).

Such a statute makes the power of the administrative officers extend to the decision, not merely of

questions of fact, but of all questions touching the right of the person affected in any respect. All the later immigration cases arise under similar acts.

These statutes are very different from the Tea Law, which contains no provision of this character. It commits to the examiners and appellate board only the decision of one prescribed set of questions of fact—whether the samples offered for import fulfil, when examined in a prescribed manner, certain prescribed qualifications. The general scheme of the two laws is quite different. Instead of committing all power in the premises to a single administrative group like the immigration authorities, the Tea Law divides up among various officials the functions which are to be performed. It creates (§ 2) a Board of seven experts to recommend standards; it provides for examiners at the several ports; it creates a Board, consisting of three of those persons who happen at the time to be General Appraisers, to act as an appellate court; and it directs the Secretary of the Treasury to fix the standards upon the recommendation of the boards of experts, and to make general regulations. The clause conferring the latter power (§ 10) is by no means as sweeping as many of those in other acts. It provides only that "The Secretary of the Treasury shall have the power to enforce the provisions of this Act by appropriate regulations". The act thus does not commit all its powers to one set of executive officers, such as the immigration authorities, who are to control the entire situation and apply their expert knowledge to the problems which arise, but distributes them among a number, no one of which is given control of the entire administration of the law.

The Tea Law does, indeed, like the immigration

statutes, specify what may come in and what must stay out. It provides in unmistakable terms that teas equal in purity, quality and fitness for consumption to the standards may come in, and that teas inferior to the standards in any of these three requisites are to be rejected. But it contains no provision committing to anybody the decision of all questions involving the right to enter. On the contrary, all that it refers to the examiner and, on appeal, to the appellate board, is the testing of the proposed import, for purity, quality and fitness for consumption, in comparison with the standard teas. Even this power is not committed to the unrestricted discretion of the examiners and of the board, but the method which they are to adopt is definitely prescribed. The testing has to be done "in accordance with the usages and customs of the tea trade," &c. All that the appellate board is therefore authorized to do is to determine, in a particular manner, a specific question of fact, and there is a notable absence of any of those sweeping general provisions, such as are present in the immigration statutes, which extend their powers so as to cover questions of law, or which confine to the administrative officials the consideration and determination of questions of construction which arise under the act and under the Treasury regulations.

This suit was not an attempt to induce the court to usurp any part of the exclusive jurisdiction thus conferred upon the appellants. The questions which the court was asked to decide were not the questions committed by the act to the administrative officers. The Act empowers the examiners and the appellate board to determine in the prescribed manner whether in fact the teas offered for import are or are not equal in purity, quality and fit-

ness for consumption to the standards. With their determination of that question in the manner prescribed by statute, the court has nothing to do. We do not ask its interference with the disposition of these questions. The issues upon which we ask a decision are issues of law. We ask the court to determine the construction of the act—the meaning of the words “purity, quality and fitness for consumption”, and of the clause prescribing the test which shall be used. We ask the court to say what the question is which the law requires the Tea Appeals Board to decide, and by what method of examination it requires the Board to reach its conclusion. It is well recognized that such questions of construction are not ordinarily committed solely to the administrative tribunal for final decision (*Moore v. Robbins*, 96 U. S. 530), but remain within the jurisdiction of the ordinary courts. Our suit seeks an adjudication solely of questions of the class thus retained within the province of the courts. We do not seek to have the Board controlled in its decision.

It is true that in the immigration cases the decisions have gone so far that such questions as we seek to raise here might, under the immigration laws, be held to have been withdrawn from the jurisdiction of the courts and remitted to the administrative officials. Those laws, like the Tea Act, prescribe definitely the terms of admission to the country; and the meaning of those terms of admission is as true a question of law as any other question of the construction of a statute. As such it would normally be for the courts to decide, but the provision of the statute which renders final “all decisions” of the immigration authorities on the subject of the right of aliens to land appears to

withdraw from the courts and confer on the administrative officers power to determine it. Our contention is that, since the Tea Law contains no such provision, such questions of construction are not withdrawn from the jurisdiction of the courts, within which they normally fall.

Even if the Tea Law were not different from the Immigration Laws in that it lacks the provision making administrative decisions final on all questions, the principle of the immigration cases would not require a holding that there would be no jurisdiction here. All those decisions, substantially, seek to review decisions of the Administrative officers in particular cases—the precise field undoubtedly committed to them by the law. None that we have seen attacks a departmental regulation, as we do here, on the ground that it requires a violation of the statute. Neither does any of the cases attack, as contrary to law, an avowed intention, like that of the respondents here, expressed by an administrative officer, to apply the law construed in a particular way. If such a contention were made, even in an immigration case, it is probable that the court would instantly take jurisdiction. Take, for example, the following: The law admits Chinese, if they are citizens. Suppose during some popular anti-Asiatic agitation, that a regulation were promulgated requiring examiners to admit as citizens only such among persons otherwise qualified as had had an American grandparent, or such as were over forty years old, or over six feet high? Would the court hesitate for an instant to condemn such a regulation? And if the immigration inspector, in answer to the suit, should say, "True, the regulation is bad and not binding on me, but the matter is committed to my discretion and I intend to

exclude every immigrant less than six feet high"—would not an injunction issue *instantly*? Again, though the immigration laws do not, as the Tea Law does, prescribe the method of examination by which the question of fact is to be determined, would any court hesitate to interfere with a regulation requiring inspectors to decide the question of citizenship by wager of battle, or by flipping a coin? The truth probably is that not even the immigration laws delegate to the administrative officer power to decide, to the exclusion of the courts, the meaning of the law they administer, but that the requirements for admission, established by those laws, have been too clear to require construction or permit misapprehension by the department.

In the absence of any provision expressly delegating exclusive jurisdiction to the board, it seems clear that the court must retain its ordinary function of construing the law. The delegation of such powers to an administrative board certainly goes to the extremest limit of the constitutional power of Congress. Indeed, the immigration statute in question seems originally to have been sustained rather because of the inconvenience which would have resulted from upsetting it, than because the court was free from doubt of its constitutionality (*Lem Moon Sing v. U. S.*, 158 U. S. 538). No statute should be construed to work, by mere implication, so enormous a delegation of authority, unless such an intent is unmistakable on its face. Such a delegation makes the administrative officer at once sheriff, prosecutor and judge. It enables him to define his own function and powers as he pleases, and to exercise both in unrestrained tyranny. It is an unusual and abnormal form of legislation, contrary to the principles of

the common law; and there is no rule which would require the court to construe any statute liberally in order to bring it within this anomalous class. On the contrary, every statute conferring upon administrative officials powers over the individual and his property is to that extent in derogation of common right, and should certainly be construed with reasonable strictness. It is altogether outside the ordinary character of our institutions to clothe an officer with a set of powers and also with the unrestricted right to define those powers, so that he may broaden or narrow them at will. The unique fundamental feature of our Constitution is that not even Congress may determine the extent of its own powers. From the date of the original decision holding that our courts had the power to decide that statutes were unconstitutional, it has been the settled public policy of the country that the courts should retain and exercise the right to determine whether a person claiming official powers was or was not entitled to them. This public policy should lead the court to interpret the statutes in question, not so as to confer upon the Tea Appeals Board this abnormal power of determining its own jurisdiction, but so as to limit its functions to the decision of questions of fact to be defined by the ordinary process of judicial construction.

Judge Hough's decision, however, held explicitly that the Tea Law conferred on the Board exclusively the power to construe its requirements. He says (fol. 648) :

"The real question is whether failure to
 "comply with the standard in the matter of
 "color or coloring matter alone is to be con-
 "sidered an inferiority in purity or quality.
 "This is emphatically a matter of opinion—
 "of discretion."

He then goes on to state that the conclusion that the matter in dispute is one of discretion leads him to dispose of the case by a reference to *Louisiana v. McAdoo*, 234 U. S. 627, holding that courts will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution.

Surely, with all respect, this begs the question. It assumes that because the question as to what, under the Tea Law, is an inferiority in purity, is a matter of opinion, it must be a question committed solely to the Board. But the question, "What is an inferiority in purity?" is but another form of the question, "What does the Tea Law mean by purity?"—an ordinary question of statutory construction. It is indeed a question of opinion; but so is every other legitimate question of statutory construction. If merely because it is matter of opinion it is cut out of the court's ordinary jurisdiction and committed solely to the Board, so is every other debatable question. Of course, as to all questions which are actually committed to administrative officials, the principle of *Louisiana v. McAdoo* applies; but to apply that principle here is to assume the point at issue, by arbitrarily asserting the commitment of the question to the Board alone.

It is obviously true that on every re-examination of tea, the Board must determine the question of fact whether the import is inferior in purity to the standard. That question of fact is doubtless exclusively committed to the Board. It can be dealt with or approached, however, only after some one has construed the law to find out what it means by "purity". The whole purpose and effect of the act depend on the answer to that question of law. To

let the Board alone answer it is to let them make the law as well as enforce it. Of course, till the law has been judicially construed, the Board has to construe the statute for itself as best it may. It must adopt some meaning for the language it is to obey. This is true, however, of every provision of most statutes. All have to be executed by some officer. Each such officer has to use his own judgment on questions of construction in the first instance and till judicially corrected; and if that mere fact showed the intention of the legislature to commit such questions to them exclusively, the courts would be left powerless to construe any statute. The policeman who arrests a thief has first to construe for himself the statutory definition of larceny; but that does not show that the legislature meant to deprive the court of its right to construe the larceny statutes, and leave the matter wholly to the constable making his decision final. *Louisiana v. McAdoo* does not decide that a statute like the Tea Law clothes the administrative officers who are to enforce it with exclusive power to construe it. The statute in that case was radically different from the Tea Law in that it expressly did that very thing, giving the Secretary power to construe, and making his construction binding (R. S., § 2652; 18 Stat. 528). There is nothing of the kind in the Tea Law.

It is submitted that the authorities fully sustain our contention that under statutes which, like the Tea Law, delegate to administrative bodies power to determine questions of fact, the courts still have jurisdiction to construe the act so as to define those questions, and then to determine whether or not regulations governing official actions required by the act are valid—whether, indeed, any administra-

tive ruling, construing the statute and designed to govern the future action of the officers in enforcing it, is authorized. The authorities also sustain our contention that administrative officers may be enjoined from enforcing an administrative regulation which applies an incorrect construction of the law. This very thing—the grant of exactly the relief which we seek in the case at bar—was done by the Circuit Court of Appeals for the Eighth Circuit in *St. Louis Independent Packing Co. v. Houston*, 215 Fed. 553. In that case the Secretary of Agriculture, who, under the Meat Inspection Act, had power to make regulations similar to that of the Secretary of the Treasury under the Tea Law, made a regulation providing that sausage should not contain cereal in excess of 2% and requiring that when sausage did contain more than the specified percentage the inspectors should refuse to pass it. The complainants brought suit against the Secretary of Agriculture, the Chief of the Bureau of Animal Inspection and the local inspector. They were able to serve only the local inspector. Their bill of complaint alleged that the law did not authorize the rejection and condemnation of sausage on the ground for which the regulation required the inspectors to reject it. They therefore prayed for an injunction restraining the authorities from refusing, upon the ground mentioned, to mark the complainants' product as "Inspected and passed". The trial court denied the injunction, but the Circuit Court of Appeals reversed the decree and granted it. Examining the construction of the statute at length, they determined that it did not authorize the prohibition contained in the Secretary's regulation, and they accordingly forbade the enforcement of that prohibition. This de-

cision was reaffirmed, upon most careful reconsideration, when the case again came before the same court, after the Secretary had been brought in, in 242 Fed. 337. It is precisely parallel to the case at bar, in which we argue that the Secretary had no power to require the rejection of tea for color only, and ask an injunction restraining the authorities from rejecting it on that ground.

In *Morrill v. Jones*, 106 U. S. 466, the statute under consideration provided that animals if imported for breeding purposes might, upon proof satisfactory to the Secretary of the Treasury, be admitted free of duty, and authorized him to make appropriate regulations for the enforcement of the act. The Secretary's regulation required that proof be made that the animal offered for import was of superior stock. The court held that such a regulation was entirely unauthorized and that the requirement of proof satisfactory to the Secretary of the Treasury did not clothe him with power to define or construe the requirements of the law for admission of imported animals. The facts of this *Morrill* case tend in some respects more strongly than those of the case at bar to show that Congress meant to delegate to the Secretary power to decide all questions in regard to the admissibility of the imports in question. The Tea Law contains no language which tends to commit to the administrative officer power to define requirements for the admission of tea, or to construe the meaning of the requirements as expressed in the statute. The law in *Morrill v. Jones*, however, by requiring that proof satisfactory to the Secretary of the Treasury must be made, clothed him with a wide discretion. It was not unreasonable to argue that only animals of superior stock would actually be imported *bona*

fide for breeding purposes, and that accordingly a regulation stating that the Secretary would be satisfied only with proof of such quality was a reasonable method of carrying out the intent of Congress to admit only animals which actually were in fact imported for the required purpose. The Supreme Court, however, disposed of the question without difficulty, holding that such statutes do not confer power of legislation or of substantial construction of the law, and that the regulation tended to exclude some of the class admissible under the natural meaning of the act, and was therefore void.

A case still more closely analogous to the present is that of *U. S. v. Eleven thousand one hundred and fifty pounds of Butter*, 195 Fed. Rep. 657. There the statute imposed an extra tax on butter containing under certain circumstances "abnormal quantities of water, milk or cream". The Secretary of the Treasury was by a number of statutes clothed with the most sweeping powers of enforcing the law and generally of making regulations upon the subject. (See p. 663.) Assuming to act under these powers he promulgated a regulation to the effect that butter containing 16 per cent. or more of moisture should be deemed to contain an abnormal quantity within the meaning of the act. The Circuit Court of Appeals—interpreting this regulation in the most limited possible way so that it might not effect an absolute change or enlargement of the statute but would operate merely as a rule for the construction of the words "abnormal quantities"—held it invalid, on the ground that even the most general power to make regulations enforcing a statute does not take away from the courts the power to construe the statute, and does not confer that

power upon the executive. The facts of this case are far stronger against the jurisdiction of the courts than those of the case at bar. The Secretary's powers of making regulations were conferred in much more sweeping terms, and the regulation itself, as treated by the court, purported to be nothing more than a reasonable construction of the requirements of the act. On the other hand, as we shall show hereafter, the Treasury Decision excluding all tea for mere color, irrespective of other impurities, was not a reasonable construction of the requirements of the act, but an out-and-out piece of independent legislation, imposing new and additional requirements for admission.

In *U. S. v. United Verde Copper Co.*, 196 U. S. 207, this Court held that a statute which definitely committed control of certain public lands to the Interior Department, and authorized the Secretary in very comprehensive terms to make regulations for the enforcement of the act, did not authorize him to give it an authoritative and final construction. The act permitted the use of timber on the lands in question for certain defined purposes, including "mining and other domestic uses." The regulation which was held void ruled that smelting was not one of the permitted purposes. The Supreme Court said of the power contended for:

"Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary" (p. 215).

One of the latest cases in this Court on the subject and in some respects the strongest is that of *U. S. v. George*, 228 U. S. 14. There the statute committed to the Interior Department and in particular to the General Land Office the entire business

of the management of the public lands in question. The statute prescribed the prerequisites for the issuance of patents, which included a specification of the matters which a homestead claimant was required to make oath to. The provisions which gave the Department power to make the regulations were of the most general and sweeping nature, and included (§ 2246) a special provision authorizing the requirement of oaths. Assuming to act under this section the regulation was promulgated which prescribed forms of taking pre-emption and final homestead proof, and provided, as a prerequisite for the issuance of a patent, that "the claimant would be required to testify as a witness in his own behalf in the same manner"—thus requiring an oath in addition to that specifically called for by the statute. The Court, under the authority of *U. S. v. United Verde Copper Co.*, *supra*, held that this regulation was unauthorized. The opinion quotes from the *Verde* case the following language:

"If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation."

Other cases in which departmental regulations assuming to construe statutes have been held void on similar grounds are:

Williamson v. U. S., 207 U. S. 425;
Brougham v. Blanton Co., 243 Fed. 503;
U. S. v. Foster, 211 Fed. 206;
Bruce v. U. S., 202 Fed. 98;
In re Page, 128 Fed. 317;
U. S. v. McMurray, 181 Fed. 723;
St. Louis Co. v. U. S., 188 Fed. 191.

The above authorities, we respectfully submit, and the reasoning upon which they are based, establish that a statute of the class to which the Tea Law belongs is not to be construed as cutting off the jurisdiction of the courts, unless the intention of Congress to do so is manifested unmistakably. They also hold, equally clearly, that no such intent is manifested by provisions much more sweeping in their delegation than those of the Tea Act. They demonstrate that under such enactments the courts still retain the power and duty to determine what the question of fact is, which is committed for decision to the administrative officers, what the requirements are, as to the fulfillment of which they are to enquire, and by parity of reasoning, whether the method of examination adopted is that required by the statute. The right of the court still exists, therefore, to determine what powers the Act confers upon the appellate Board and upon the Secretary of the Treasury, and whether the Secretary's regulations command a violation of the law, by directing exclusion of teas which the law would admit, or by requiring that they be examined by an unauthorized test.

The cases cited by counsel for the respondents, for the proposition that the court has no jurisdiction to grant the relief prayed, do not support his contention. *Buttfield v. Stranahan*, 192 U. S. 470, decided only that the Tea Law was constitutional and that the Collector was not liable in damages for refusing to admit teas which had been rejected for inferior quality, even if the examiners had erred and the teas were in fact of superior quality. The case was argued on both sides wholly on the constitutional questions; and all of the appellant's contentions as stated by the court (pp. 491-2) were

assertions that the law was for different reasons unconstitutional. The decision that the act was valid involved a holding that the courts could not review the action of the examiners in determining in the lawful manner the question of fact committed to them—that is, the question whether the tea offered for import was in fact equal or inferior to the standard in purity, quality and fitness for consumption. Neither the decision, however, nor any dictum in the opinion went further, or passed either explicitly or implicitly on any of our contentions, none of which were made in the *Buttfield case*. In that case, there was no contention, such as we make here, that an unauthorized order of the Secretary of the Treasury directed a decision of the question of fact upon an unauthorized ground, or by the use of an unauthorized test, or that the examiners were threatening to do the same things on their own authority. The court must, therefore, have assumed that the examiners found the teas in their judgment, inferior to the standards in the respects required by the statute, whatever those respects were. This decision, and the similar cases of *Buttfield v. Bidwell*, 192 U. S. 498, and *Buttfield v. U. S.*, 192 U. S. 499, decided only propositions with which we have no quarrel. The cases of *Sang Lung v. Jackson*, 85 Fed. 502, and *Cruickshank v. Bidwell*, 86 Fed. 7, 176 U. S. 73, add nothing to the law laid down in the *Buttfield case*. *Macy v. Loeb*, 205 Fed. 727, is, as the Circuit Court of Appeals itself stated, exactly controlled by the decision in *Buttfield v. Stranahan*. There the attempt was merely to review the action of the examiners. The allegation was that the decision of the examiners was erroneous. There was no allegation of any attempt on the part of the examiners or the board of general appraisers or of

the Secretary to exceed the authority conferred upon them by the act. And even the majority opinion seems to intimate that it is only the question of fact which is committed to the examiners and to the board, and that the extent of the requirements of the act as to the matter of the re-examination is an ordinary question of law to be determined by the courts. The only attempt of counsel for the complainants to distinguish the case from the *Buttfield* case was by the argument that the requirement of the act that the teas be "duly" examined meant an examination at which the importer had a right to be represented. This contention the majority of the court rejected. Judge Ward, however, dissented.

In the second case of *Macy v. Loeb*, unreported, which dealt with an amended version of the bill in the first case, the substantial contention was that the same consignment of rejected teas was unlawfully rejected because the board of general appraisers was not duly constituted, one of them not having been designated by the Secretary of the Treasury as required by the act, but by the president of the board of general appraisers. The court held that this did not vitiate the act of the board since a majority lawfully designated by the Secretary concurred in the result of the examination. The case has therefore no possible bearing upon the issues in our case.

It seems therefore that all the objections to the jurisdiction fail, and that the court was in duty bound to issue the injunction as prayed, if it found that we had shown equitable grounds for the relief prayed.

POINT II.

The injunction was properly granted. The Tea Law does not authorize rejection for color only. It commands examiners to admit teas which, when examined in the lawful manner, are found equal in purity to the standards, even if they contain color and the standards do not.

The requirements of the act are extremely definite. It establishes standard samples of tea which are to be in the hands of every examiner for comparison with the samples offered for import. The latter are to be tested, in comparison with the standards, in the particular method required, and if, when so tested, they are found equal in purity, quality and fitness for consumption, they are entitled to entry. The question therefore turns, in substance, upon the true meaning of the words "purity, quality and fitness for consumption." There is no dispute in the present case as to the meaning of the words "quality and fitness for consumption", or as to the superiority of the teas in question to the standards in both respects. The only question on this branch of the case is therefore as to the meaning of the word "purify". The Secretary of the Treasury, in ruling that no teas containing any color shall be admitted, asserts a right to require that all teas containing any color whatever, even in infinitesimal quantity, be deemed inferior in purity. The appellants, in asserting their intention to reject on the same ground, claim a right to lay down and enforce a rule, affecting the

complainant's property, which is justifiable only if it represents the true meaning of the Tea Law. It is respectfully submitted that this regulation is not even an attempt to construe the law, but is pure out and out legislation—the addition of a new requirement for admission, not specified in the Act.

The Tea Law must be presumed, in the absence of evidence to the contrary, to use words in their ordinary sense. The ordinary definition of the word "purity" is not a matter of doubt. The dictionary definitions show that, without exception, the primary meaning attributed to the word by all the lexicographers is, in substance, "freedom from foreign matter". The learned trial judge himself in his opinion (fol. 635) defines it in the same sense; and the learned Assistant Attorney General, in his brief in this court (pp. 14, 15), does likewise. Tea is a substance to which this ordinary definition can apply with perfect ease. It consists of the dried leaves of the tea plant and nothing else. Anything else than tea leaves (whole or in fragments) if included in the packages in which tea is commercially dealt with, is foreign matter, and is unmistakeably outside of the ordinary meaning of the word "pure". In many cases litigants contend that, as used in other statutes, the word "pure" has not this absolute and strict meaning, and that they are entitled to have considered as pure, substances which as matter of fact contain considerable quantities of extraneous matter. Here, we ask no such liberality. We believe that every particle of foreign matter in tea—whether our tea or the Government's—renders it *pro tanto* impure. There is nothing in the testimony or in the decisions either of the courts or of the Treasury Department, or otherwise in the history of the Act, to show that the word can be interpreted in any other than its

primary and ordinary sense. In that sense everything which is not tea is impurity, and of two teas that is the purer which contains the greater proportion of tea and the less foreign matter.

The Tea Law does not require absolute purity, but only purity equal to that of the standard tea. It therefore contemplates the existence of impurity in both standard and import, and permits the import to contain an amount of impurity measured by that in the standard. As to what that impurity shall, or shall not, consist in, the statute is silent. It contains no suggestion that any one form of foreign matter is to be given greater effect than another in estimating the comparative purity of standard and import. No particular impurities are referred to. Color is not mentioned in the act, which places all forms of impurity on an exact equality by specifying none and requiring that tea be excluded for impurity exceeding that in the standard, irrespective of its nature. This requirement of purity, construed in accordance with the dictionary meaning of its words, is simply a requirement that the import consist, to an extent or in a measure to be fixed by the selection of the standard, of tea, and of tea only. This primary or literal meaning is, we submit, the true meaning. There is no need to stretch the construction so as to make the requirement of purity take care of the quality as well as the quantity of the foreign matters present. The statute attends to that by a separate clause—the requirement that the import equal the standard in “fitness for consumption”. The smallest excess of any injurious ingredient does obviously make the import less fit for consumption than the standard. This provision, therefore, permits the rejection of teas which contain any considerable amount, however small, of

any injurious form of matter, or of any substance which damages the tea as a beverage, if the standard contains less of the same material. But these injurious or damaging substances are the only ingredients which the act forbids, or permits to be singled out as in themselves reasons sufficient for rejection. On familiar principles—*expressio unius est exclusio alterius*—the specific provision, excluding teas for impurities such as render them less fit for consumption than the standard, shows that Congress intended not to treat other kinds of impurity in the same way. Color is practically conceded not to be injurious, or damaging to the tea as a beverage. It accordingly falls within the general class of impurities which Congress thought fit to class together as equally objectionable or unobjectionable, and to condemn only when their aggregate amount reduces the proportion of tea in the import below that in the standard.

The practical construction of the Act, for more than fourteen years after its enactment, shows very distinctly that during that period the word "purity" was used in the sense for which we contend. The regulations, from the start, show that a number of radically different forms of foreign matter were to be expected in teas, and required the examiners to look for such matters, and to reject the teas if these impurities were found in quantities sufficient to render the total impurity greater than that shown by the standards. For example, in the original regulations of 1897 (T. D. 17995), the first under the existing law, there are a number of recognitions of the importance of foreign matter, irrespective of kind. The standards prescribed are required to contain no more than 10 per cent. of dust "inasmuch as any excess

over this percentage of dust or fanning is liable to be made up of extraneous matter."

Again in prescribing the method of comparison with standards, it is provided:

"The leaf of the infusion must equal the standard in freedom from scum, gritty substance and leaf made up from dust and congee (*i. e.*, rice paste)."

Again at the end of paragraph 20:

"We have known the natives to go as far as the pack teas with 25 per cent. of dust, rendering them very trashy and almost unfit for use."

In T. D. 18191 of July 16, 1897, the Assistant Secretary states that the Committee of Tea Standards has ascertained that teas in China have frequently been packed with excessive dust, not their own, but simply the refuse in China hong's in order to reduce the quality in proportion to the price. In a general instruction (T. D. 18594 dated November 27, 1897), the examiners are directed

"when examining samples of importations of Ping Suey tea to be governed by the amount of scum appearing on the surface of the liquor, as well as by other evidences of impurity, such as poor or decayed leaf, foreign matter and inferior quality, as indicated by the smell, taste and appearance, and to reject all such teas as produce, when infused, more scum than the standard."

In 1898 the regulation prescribing comparison with standards was modified so as to read as follows (T. D. 18933, dated February 7, 1898, Par. II):

"COMPARISON WITH STANDARDS. In comparing with standard examiners are to test

all the teas on these points, namely: for cup quality, for *any foreign matter* on the surface of the infusion, sometimes called scum, and for quality of leaf after infusion. Cup quality shall be ascertained by drawing according to the custom of the tea trade with the weight of a half dime to the cup. . . .

In order to test for floating coloring matter or scum . . . a second drawing should be made of double the foregoing weight. Before disturbing the infusion, examination should be made for any floating substance, and after pouring off the water the infused leaf should be taken out so as to exhibit the lower side which rested against the cup. Should the mass show a greater quantity of exhausted, decayed leaf or inferior leaf, *or foreign substance* than the standard, it shall be considered inferior in quality, and the tea must be rejected."

And again in the same regulation (Par. II) :

"Should a tea prove on examination to be inferior to the standard in any one of the requisites, viz.: cup quality, scum or quality of infused leaf, it shall be rejected . . ."

This latter regulation remained in force substantially unaltered until 1911 when the regular chemical analysis was promulgated, and this was soon after superseded by the original form of the Read test. Regulation 22 of T. D. 31343 dated March 1, 1911, requires a further test for coloring matter *or other foreign substance* by examination of any sediment remaining in the cup.

Again in the original chemical analysis prescribed in 1911 by T. D. 31920, the examiner is directed to look for a number of different varieties of extraneous matter.

These regulations tend strongly to show that, at the time of the enactment of the law, and for years

thereafter, any substance not part of the tea leaf was deemed an impurity; that color was treated as simply one among many such foreign substances; and that the question which the examiners were directed to solve was just what we believe it should be—that of the relative purity, or comparative total impurity of the two samples. This was the meaning attributed to the Act by all, even by the Treasury Department itself, before the present questions arose. We submit that such a practical construction is entitled to great weight, and when, as in the present case, it coincides with the dictionary meaning of the word used, and with the simplest and most natural interpretation which can be placed upon it, should be conclusive. That construction would certainly have been strongly maintained by the appellants, if the boot had been on the other leg, and we had been contending that some particular form of foreign matter was not an impurity. They would have argued impressively that the failure of the statute to discriminate put all foreign substances on a par, as equal impurities. As it is, the appellants' own counsel used the word in the sense for which we contend (fol. 437).

If this be the true meaning of the word "purity"—freedom from every kind of foreign matter—the conclusion cannot be escaped that the statute requires that all forms of foreign matter be considered in determining whether or not the sample offered for import is equal in purity to the standard. Of course, if the standard contained no color and the sample offered for import contained color, and neither one contained any other variety of impurity whatever, the sample would be inferior to the standard and would have to be rejected. We do not now question the right of the Secretary to

select, if he can, a standard containing no foreign matter whatever, in which case—and in which case only—an import containing any color would necessarily be less pure than the standard, and could properly be excluded for color alone. As soon, however, as it appears, that a standard contains other impurities, the sum total of the impurity or foreign matter in the standard may be so great as vastly to exceed the total quantity of color present in a sample offered for import. In that event, the sample may contain less total foreign matter than the standard, and the only way in which the relative purity of the two can be determined is by comparing the total quantity of foreign matter present in each, including color.

No better example could be given than arose in the case at bar. According to Dr. deGhuée's uncontroverted testimony, the government standards contained in the neighborhood of 2,000 parts to the 1,000,000 of mineral impurity, including color; while the samples offered for import contained from 700 to 1,000 parts to the 1,000,000 less total mineral impurity, including color (fol. 494). The samples offered for import, however, included *one* part in a million of color, while the standard teas included some, but a lesser quantity, of the same material. Accordingly it appeared that the standard contained nearly twice as much total impurity as the sample offered for import, and that the quantity of color contained in the sample offered for import was not much more than 1/1000th part of the total mineral impurity present in the standard. Accepting the testimony of the government chemist to the effect that some of the teas in question contain as much as 19 parts to the million of color, the total quantity of color was less than 1/20th

part of the mineral impurities discovered by Dr. deGhuée in the government's standards. These illustrations, unimportant in themselves, demonstrate beyond a doubt that teas in practice do contain, as obviously they may contain, more color than the standard and yet vastly less total impurity. It follows, therefore, that a regulation directing the exclusion of teas for color only, completely disregards all other impurities and would require the examiners to hold that a tea containing one part in a million of color and no other impurity whatever was inferior in purity to a colorless standard containing 100,000 parts in 1,000,000 of the most dangerous organic filth. It is respectfully submitted that there is no conceivable meaning of the word "purity" within which such a determination could be deemed reasonable. Surely Congress, in enacting that teas purer than the standard might come in, never meant any such absurdity as to permit an examiner to hold that a tea which was half dirt was purer than a tea of which all but a millionth part was tea.

It has been suggested by the appellants that the teas in question were examined for impurities other than color, but have already demonstrated that they are superior to the standards in regard to freedom from other impurities, so that no question remains except as to their color contents. This is an assertion that the relative purity of standard and import can be determined by comparing the color contained in each, without giving the import any credit at all for admitted superiority in freedom from other impurities. It amounts to a contention that the Treasury Department has the right to require a separate comparison between standard and import with regard to each possible

form of impurity, and to require that the teas be rejected if they contain more of *any one* of these impurities than do the standards, no matter how much less of any or every other impurity may be present in them than in the standards. This is legislation with a vengeance. The statute requires equality with the standard in only three requisites—purity, quality and fitness for consumption. The appellants now claim the right to split up the general requirement of purity into a score of separate requirements, failure in any one of which will cause the rejection of the tea. They say in substance: we may examine by one process for color; by another for sand; by another for imitation leaves; by another for paraffine; by another for catechu; by another for added tannin extract; by another for clay, &c., *ad lib.*, and if in any one of these respects we find the tea offered for import inferior to the standard, we have the right to deem it inferior in purity and reject it, however superior it may be in freedom from all the other foreign substances.

Surely this is not the meaning of the Act. What is required is general purity equal to that of the standard, not purity with regard to each of a dozen or more possible ingredients. The statute fails to discriminate between different forms of impurity and we must, therefore, assume that none was thought to lessen the purity of tea to a greater extent than an equal quantity of any other. It does, by the clauses requiring equality to standard in quality and in fitness for consumption, provide against such particular impurities as may, in and of themselves, impair the quality or wholesomeness of the import. Such impurities as color, however, which damage neither the quality nor the fitness

for consumption of tea, are dealt with only by the general requirement of purity. In view of the direct legislation against substances which injure quality or wholesomeness, the failure of Congress to discriminate against any other kinds of impurity must be deemed intentional. The history of the subject shows that so far as color is concerned, it was intentional. Green teas were always colored in 1897 when the Act was passed, and color would therefore certainly have been specially referred to if thought an impurity more important than others, or if "purity" had been used in a sense in which a clean tea containing microscopic color could be called less pure than a dirty tea which contained no color. Beyond doubt, however, color in moderation was not deemed objectionable. Its harmlessness is substantially undenied. The evidence shows that for fourteen years after the passage of the Tea Law substantially all green teas offered for import contained considerable quantities of color; yet during all that time the statute remained unaltered, while the regulations treated color simply as one among many equally important or unimportant impurities, all of which were to be considered in comparing purity.

If the requirement of the statute were of *absolute* and not, as it is, of *comparative* purity,—equality with the standard in purity—the presence of any one kind of foreign matter would of course condemn the sample under examination, unless that particular variety of foreign matter was so usual and so expected as not to constitute an impurity at all. But where, as in the case at bar, the question is not of absolute but of relative purity—of purity in comparison with that of a standard sample—the rejection for one single impurity alone inevitably re-

sults in the total disregard of all others in the standard, however great in quantity. The contention of the respondents, that the impurities may be compared separately, and the import rejected if any one of such impurities appears in greater quantity than in the standard, amounts to a claim of power to impose any number of separate requirements instead of the single statutory requirement of relative purity,—power, that is, to require that the import contain less sand, *and* less clay, *and* less bogus leaves, *and* less added tannin, *and* less organic filth, *and* less of any other substance which may be named, than the standard, instead of merely less total impurity. This is as arbitrary as it would be for an accountant charged with the duty of determining whether an alleged bankrupt's financial position was or was not equal to the standard prescribed by the Bankruptcy Law—that is, whether he was or was not insolvent—to split up the man's assets into different classes, and his liabilities into different classes, and declare him insolvent if any one of these classes of assets did not equal the corresponding class of liabilities; if, for example, his bills receivable did not equal his bills payable. The bills receivable in question might be less than the bills payable by only \$1,000—while his other assets might exceed the liabilities by millions, and still this method of determining the question would result in a holding of insolvency. This is no more absurd than the appellants position. They claim the right to reject a clean import as more impure than a dirty standard, if a particular class of foreign matter in the import exceeds the similar matter in the standard.

The appellants suggest that the import is compared with the standard as regards contents of

foreign matter other than color, by the cup test and otherwise. The fact is, however, that the examination for color, as directed in Regulation 22, is apparently the only examination which the regulations direct for the ascertainment of purity. Regulations 20 and 21 provide for the cup test in accordance with the customs and usages of the tea trade, but this is now in terms applied solely to the ascertainment of *quality*. The provisions of the former regulations which apply this test to the ascertainment of the presence of foreign matter have been carefully left out of the regulations, and the cup test is now applied solely for quality. It is true that, by this cup test, the examiners are to look for exhausted leaves, but the presence of such exhausted leaves is referred to as affecting the quality of the tea, not its purity. This is another indication of the correctness of the construction of the word "purity" for which we contend. Within that construction exhausted leaves would not be an impurity, since they are in themselves tea, and not foreign matter. They are of course highly inferior tea, and their presence would naturally affect the quality of the entire sample. The regulation is therefore perfectly logical in describing the examination for exhausted leaves as an examination for quality. There is thus no examination for purity except by the Read test, but if there were it would be nugatory, because nobody pretends that, as against color contents, any credit is or will be given for superiority to the standard in freedom from other impurities.

To our contention that "purity" means general purity, counsel for the appellants replies in substance that the statute commits exclusive power to define this term to the board of seven experts who are to recommend standards: and that if they select

a colorless standard they thereby define "purity" as equivalent to "colorlessness". There is nothing in the statute to justify this. The board of experts is authorized solely to recommend standards which, when adopted, establish the measure by which the purity of imported teas is to be judged. They furnish the yardstick, but neither tell what a yard is nor what sort of material may constitute a yard. Their function is limited to the selection of physical quantities of teas. The impurity in these teas, as in every other kind of merchandise, is of many different forms. The experts can select standards containing much or little of such impurity, which may be of any kind; but there is not a word in the act which even suggests an intention on the part of Congress that they, or the Secretary either, should have the right to determine, to the exclusion of the courts, what Congress meant when it said "purity". The experts and the Secretary can determine, by setting standards, what the imported tea must be equal to; but Congress has itself determined in what respects the import must equal the measure. The argument really is that by giving power to the experts to select the particular tea which the import must equal in purity, the law also gave them power to require that the import also equal the standard, not alone in purity, but also in each of any other characteristics it may have—in freedom from every impurity separately. This is like saying that because the proper commissioners have power to establish standard measures at Washington, they may, by selecting, as the standard gallon, a cube-shaped platinum vessel, require that all gallon cans be cubic and made of platinum.

The appellants also argue that our construction of the clause requiring purity is incorrect because,

they say, it is impossible "to take the sum or average" of different impurities. This, says the distinguished and learned counsel for the government, is "preposterous" (brief, p. 21), and again, "The mere statement . . . shows its ridiculousness" (brief, p. 13). In spite of this restrained and dignified condemnation, we feel that the appellants' argument in this behalf may properly be qualified as mere assertion. Every particle of non-tea matter in the merchandise is impurity. The comparative total amount, in standard and import, is readily ascertainable, roughly by the cup test, or accurately by that ordinary form of general qualitative and quantitative analysis which the ordinary layman and legislator has in mind when he speaks of chemical analysis. No difficulty arises until, departing from the act, which treats all impurities alike, the attempt is made to single out particular impurities, and give them an effect greater than that which they would have as a mere part of the total mass of foreign matter. It may be that this lumping of all impurities together, as equally objectionable, is not as wise a provision as the learned counsel for the appellants could devise, or the Secretary promulgate. But it is the provision which Congress has enacted, and it should not be repealed by either departmental or judicial construction. It seems to us, however, a common-sense enactment, and as practically construed for fourteen years it worked fairly substantial justice. Teas less clean, all told, than the standards, were readily shown up by the cup test, whatever their impurity was. This test was the result of business experience, and was doubtless for that reason, the method primarily required by the act. In practice, it accomplished very well that summing up of the total impurities which

counsel call impossible. Only after the regulations were so modified that the cup test was no longer used in testing the comparative purity of the teas, but was applied solely to ascertaining their quality, was any such difficulty imagined.

Indeed, what the government says is impossible, preposterous and ridiculous, is done every day under one of the most important laws on the statute-book. The practicability of such a requirement of general purity, making no distinction among impurities, but demanding only that, all told, the foreign matter present shall not exceed a given figure or percentage, is proved by the fact that under the Pure Food Law just such a requirement is common. That statute provides that a drug which differs from the standard of purity laid down by U. S. Pharmacopœia shall be deemed adulterated. In numerous cases, in fact in the case of nearly every one of the commoner chemicals, the Pharmacopœia, by requiring only that the drug contain a fixed percentage of the substance which it purports to be, permits a given percentage of foreign matter. This foreign matter may be of any kind whatever, except for such particular ingredients as are specifically excluded or forbidden. (For examples see U. S. Pharmacopœia, Ed. 1900, pp. 235, 363, 395.) There is no difference, in substance, between a rule like that of the Pharmacopœia, requiring for example, that Calomel contain not less than 99½% Mercurous Chloride, and the rule of the Tea Law requiring that tea imports shall contain as little non-tea or foreign matter as is contained in a given specimen or standard. The Pharmacopœia measures the permitted amount of foreign matter by a definite percentage; the Tea Law by a physical example or standard. The two rules set up identically the

same requirement of general purity. When, in addition to this, it is desired to require the absence of specific ingredients, the Pharmacopœia expressly provides that the substance shall not contain more than a given amount of them. The presence of such specific prohibitions, directed against all ingredients deemed specially undesirable, in the Pharmacopœia, and the absence of anything of the kind in the Tea Law, confirm our view that the latter was intended to require only purity in the general sense.

From all these considerations it seems to us to follow very plainly that the Tea Law authorizes the rejection of tea only for total impurity (in the sense of aggregate foreign matter) exceeding that of the standard, and that the Secretary of the Treasury, in ordering the rejection of tea for color only, is commanding the examiners to reject tea which may be vastly superior in purity to the standards, and is therefore assuming to change the requirements specified in the Act, and to forbid the admission of tea which the law gives the right to import. It is, however, to be presumed, and the appellants assert, that they intend to obey this order. It is apparent that our teas, if examined under this regulation, may be rejected in spite of the fact that even on the basis of the government's testimony they contain less total impurity than the standards. We therefore submit that the case for equitable relief is clear, and that the appellants were properly enjoined from rejecting our teas on the sole ground that they contain color, or on any other ground having reference to their purity, except they be found to contain more total impurity in the sense of foreign matter generally than is to be found in the standards.

POINT III.

Irrespective of the correctness of the decision appealed from the complainants were entitled to and should be granted an injunction restraining the appellants from determining the admissibility of the teas by the result of an examination conducted in the manner prescribed by Regulation 22 of T. D. 33211. That method is unauthorized.

The case of *Merritt v. Welsh*, 104 U. S. 694, established—if authority were needed—that where Congress has required that the admissibility of an import be determined by examination, in comparison with standards, by a particular test, the Secretary cannot by regulation require another kind of test, however superior.

The Tea Law prescribes the test which is to be applied. It requires that the purity, &c., of the tea be "*tested*", in comparison with the standards, in accordance with the customs and usages of the tea trade, including the infusion test and, if necessary, chemical analysis. It would seem elementary that the method of examination which is to be prescribed must have some tendency to accomplish the purpose for which it is to be prescribed. A method of examination which is to be used in testing the relative purity of two samples must, we submit, be capable of giving some information on the subject. Unless it has the power to determine with some approach to reasonable accuracy which of the samples is the purer, it cannot "test" the comparative purity of the two.

So far as we can see it is undisputed that the method prescribed by Regulation 22 entirely fails to meet this requirement. The testimony of Dr. deGhuée and Dr. Chandler to the effect that the test showed absolutely nothing as to the presence of any form of foreign matter, other than color or facing, is not only uncontradicted, but is concurred in by the appellants' witness (fol. 369). Indeed contradiction would be impossible, as the very nature of the test shows on its face that it could not possibly detect the other forms of impurity present in tea, since nothing can possibly be shown by it except substances capable of smearing the test paper. Accordingly, even if the test were accurately quantitative as to color, even if it would show exactly how much color was in each tea, it would have no tendency to show whether the total impurity in the sample offered for import was equal to or less than that in the standard. The required examination is therefore incapable of doing the work demanded by the statute. It cannot test the relative purity of the two teas.

But even when used for the sole purpose of discovering color, the method prescribed by Regulation 22 is unworthy to be called a test at all. The testimony shows beyond question that it gives no reliable information of any sort, quantitative or other. Dr. deGhuée testified that it would not show color even if present in considerable quantity, if sufficiently finely divided. The testimony of the appellants' witness, Dr. Acree, to the effect that he had failed to color teas so as to produce this result (fols. 444-454), does not of course disprove Dr. deGhuée's testimony that he, by a different method, had succeeded. On the other hand, the truth of Dr. deGhuée's statement that color

may escape the test is apparent from the fact that he found, with the microscope, hundreds of color particles in the government standards, which were proof against the Read test. Accordingly, the results of the Read test, even when used solely to find out whether color is present or absent, may be utterly vitiated by the fact that the color present in the standard may be more finely divided than a less quantity present in the sample offered for import. Moreover, the proof was conclusive that even when there is no difference in the fineness with which the coloring matter is divided, the test is grotesquely uncertain. The appellants' witness Dr. Cameron thought that it did give a roughly quantitative result, but on being shown the two Read Test sheets introduced by the complainants for teas artificially colored with *the same amount of the same coloring matter* (Exs. 3 and 5), stated that in his opinion one of these showed the presence of a great deal more coloring matter than the other (fols. 359-361). If the test had, under any conditions, any quantitative value, such as he testified it had, he would have been right. As it was, Exhibit 3, a sheet well smeared with blue, was obtained from tea colored as much and no more than the tea from which Exhibit 5 was had, which showed only a few almost invisible specks.

And if it could be said that the method prescribed by Regulation 22 was a method of testing the relative purity of the standards and of the samples offered for import, we submit that its use would still be unauthorized. The Tea Law permits only such a test as is "in accordance with the customs and usages of the tea trade, including * * * if necessary, chemical analysis". The Read test as prescribed in Regulation 22 is con-

cededly not known to the customs and usages of the trade. The appellants assert that its use is justified by the provision permitting the use "if necessary" of chemical analysis, and they insist that the process which the regulation requires is a form of chemical analysis. If this were so, however, it would be immaterial. If the method of examination prescribed were the plainest chemical analysis ever known, it would still be illegal because, as shown above, *it is not a test of the relative purity* of standard and import, and the statute imperatively requires such a test. To require a chemical analysis is not enough. The statute calls for one which is capable of making the necessary comparison.

But Regulation 22 does not require any chemical analysis at all. Dr. Chandler and Dr. deGhuée say it does not (fols. 291-6, 186-9), and their great authority is supported by satisfactory reasoning. The test is merely a mechanical separation of substances, performed without chemical means—a mechanical analysis having no chemical characteristic. The question whether or not the process prescribed is a chemical analysis, turning as it does on the meaning of a statute, is not one of the scientific, but of the ordinary, use of English. The words "chemical analysis" were doubtless used by Congress in the sense in which they are understood by the man in the street. It is respectfully submitted that that sense, as shown by the dictionary definitions submitted and otherwise, is precisely that stated by Dr. Chandler. A chemical analysis is something which finds out what substances there are in the product under examination, and how much of each. Surely no layman would ever imagine that, if he called for a chemical analysis of anything, his request could possibly be met by a process which sim-

ply sought to ascertain whether or not one ingredient was present. We have no hesitation in affirming that any man, not a chemist, who should ask for a chemical analysis of a substance, would inevitably expect to be told, in reply, all that the chemist could tell him as to at least what ingredients were present. This definition is exactly in accordance with that which Dr. Chandler, whose experience and authority is certainly greater than that of any of the other witnesses, testified was the proper meaning of the words. He stated in substance that chemical analysis meant a general examination disclosing all the main ingredients and that the examination to determine the presence or absence of a single ingredient would properly be termed a chemical test. This testimony certainly accords with ordinary experience.

The question as to what is meant by chemical analysis seems to have been touched by the courts only in one case. In *Shivers v. Newton*, 45 N. J. Law, 469, the Court were discussing a statute that provided that milk that contained more than 85 per cent. of watery fluids or less than 12 per cent. of milk solids should be held to be adulterated, an analysis was defined as follows:

"An analysis is supposed to be a determination arrived at *with accuracy* because scientific. But it is upon the fact of the analysis that the case rests. An analysis means a scientific and therefore accurate ascertainment of the elements and their proportion contained in the fluids submitted for examination. The fact that a certain man made an examination, disclosing the existence of a certain proportion of solid and fluid elements in the milk amounts to nothing unless it is an analysis; an accurate ascertainment of the elements by chemical process" (pp. 475, 476).

The government witnesses were apparently able to express the opinion that Regulation 22 called for a chemical analysis because they defined the words so broadly as to include any examination which had the purpose of identifying any chemical substance or chemical quality. One of them went so far as to state that even the separation, by hand, of sand from sugar, would be a chemical analysis if you guessed the nature of the sugar by looking at it (fol. 368); while another stated that it would be a chemical analysis if you broke up the chair on which you were sitting, and by looking at the fragments identified them as being made of wood (fols. 376-7). Of course a definition so broad as this, while it may be scientifically defensible, is nothing short of nonsense when attributed to laymen or the man in the street, or when applied to the construction of a statute dealing, not with a science, but with a plain business. If the phrase can be used in any such loose sense, the boy who picks slate from coal at the mines, and the farmer who removes chaff from wheat, are performing chemical analyses. But a Congressman who talks about chemical analysis means something very different from separation by hand of sand and sugar, or the breaking up of a chair. He necessarily refers to some process having chemical characteristics and looking toward the ascertainment of the general make-up of the substances in question.

The appellants seem to contend that the meaning of the words "chemical analysis" depends upon the purpose with which the examination is undertaken. They assert in substance that if you seek a piece of chemical information, that is, information as to the chemical nature of anything connected with the

product under examination, anything you do in the course of your search becomes a chemical analysis. If this be so, it is impossible to determine whether or not a given process is a chemical analysis until you know its purpose. In other words an examination which has no chemical features whatever, which may be as simple as a, b, c, and may be performed by a deaf, dumb and blind person ignorant of the existence of chemistry, may be a chemical analysis if its purpose can be described as chemical. Conceding that Regulation 22 calls for no chemical operations, they assert that because its purpose is to identify a substance, which like any and every other substance, may be called chemical, it becomes a chemical analysis. Assuming this to be true, we respectfully submit that even so it is not such a chemical analysis as was contemplated in the Act. If the purpose determines what is and what is not a chemical analysis, then the question as to what is the kind of analysis called for by this Act must be determined by the purpose specified in the Act. The Act calls for a test of the comparative general purity of two samples. Clearly such purity cannot be tested by chemical analysis except by the sort of chemical analysis which discloses, not the presence of any one impurity alone, but of all impurities. This is so clear that even the respondents' witnesses acted upon it. Dr. Sherman freely admitted that if called on to make a chemical analysis simply to determine—just as the tea examiners have to determine—which of two samples is the purer, he would necessarily make his analysis so complete as to disclose the whole chemical contents, including substantially all impurities (fols. 389-394). This question

put Dr. Sherman in precisely the position in which the statute places the examiners; and he answered it exactly as we contend that the statute required them to answer it. Accordingly, if the purpose is the determining factor, the court should hold that no process can be deemed a chemical analysis under the Tea Law unless it is calculated to disclose at least the presence of all kinds of matter which are not tea, and also to determine whether the quantity of such foreign matter is greater in one sample than in the other. Certainly Regulation 22 does not meet this requirement.

That the chemical analysis which Congress had in mind was an analysis intended to disclose, identify, and estimate the total quantity of, all the foreign matters present in the tea, is also indicated by the fact testified to by Dr. deGhuée, that at the time the Tea Law was passed there were in existence numerous works devoted to food examination which contained chapters or sections devoted to the chemical analysis of tea, all of which prescribed a general analysis of the tea by regular ordinary chemical processes, calculated to disclose and identify, not any single form of foreign matter, but all substances not normally present in the leaf itself. These books, abstracts of the substance of which were offered in evidence (Exhibit 2), tend to show that, at the date of the passage of the act, chemical analysis of tea was generally understood as a process intended to show the whole chemical contents of the substance and particularly all impurities.

In addition to all this, the method required by the present Regulation 22 determines the admissibility of the tea exclusively by the result of the Read Test in precisely the form in which it was held not to be a chemical analysis, and therefore illegal, by the Board of General Appraisers—

the appellants' own predecessors—in T. D. No. 32959 and T. D. 33087. At the time when the Board reached those decisions the regulation was identical with the present up to the point where the blue specks appear upon the test sheets. The regulation then stopped there, and did not contain the present provision requiring that the sheets be sent to the chemist for identification, and though about a dozen government chemists testified before the Board that they considered it a chemical analysis, the Board had no hesitation in holding that it was not a chemical but a mere mechanical analysis, since it called for no chemical process, method, reaction or result. This decision they reached, although the question was put to them in its bald form, simply as to whether or not the test was any kind of a chemical analysis at all, without reference to whether or not it had the only characteristic which could bring it within the Tea Law—that is to say, power to test the relative purity of import and standard. On the basis of Dr. deGhuée's testimony at that hearing, when he accepted, for the purposes of the discussion, the broadest possible definition of "chemical analysis" without reference to its usefulness as the test required by the statute, and stated that the method was not a chemical analysis mainly because it failed to identify any chemical substance, the General Appraisers suggested that the Read Test, if supplemented by some chemical process leading to the identification of the color disclosed, might be deemed a step in a chemical analysis. Thereupon the present regulations were promulgated, in which the examiners were directed to send the test sheets to the government chemists for identification of the color or facing material appearing thereon. It is respectfully submitted that this was the merest evasion and subter-

fuge. The regulation, as now framed, leaves the government chemist free to identify the color by any means he may choose, chemical or otherwise. He may merely look at it and guess its nature. Since no importance or effect whatever is given to his judgment we surmise that this is what he does. If so, the identification would not have the magical effect which counsel for the respondents attribute to it of turning the whole process into a chemical analysis even within the definition suggested by Dr. deGhuée as the extremest possible (fol. 241). But whether or not any chemical process is carried out by the government chemist, the regulation neither requires it nor gives any effect to his work. When the color is identified the teas are to be rejected no matter whether the color turns out to be Prussian Blue, Indigo, Ultramarine or the rarest of aniline colors. Accordingly the result of an examination under regulation 22, as it now stands, is left to depend on exactly the same test as was condemned by the general appraisers. We respectfully submit that this is not an acceptance in good faith of the appraisers' suggestion and that the alteration in the form of mechanical analysis condemned by them does not convert it into a chemical analysis.

In this connection the language of the regulations is significant. Until 1913 the general paragraph of each of the annual regulations—for example, paragraph 11 of T. D. 27124, being the regulations for 1906—provided in the exact words of the Tea Law:

“The examination of tea by examiners or boards of United States General Appraisers under this Act shall be made according to the usages and customs of the tea trade, including the testing of an infusion in boiling water and, if necessary, chemical analysis.”

With the adoption of T. D. 33211, the 1913 regulations, the latter part of this clause was changed so as to read (Regulation 11) :

"The examination . . . shall be made according to the usages and customs of the tea trade, including the testing of an infusion in boiling water and 'the Read method with additions and modifications for the detection of artificial coloring and facing' (see Regulation 22)."

There is no reference, in the regulation, to chemical analysis. The Treasury Department itself therefore recognizes a vivid distinction between chemical analysis and the present form of the "Read method with modifications". If even the department had really thought it a form of chemical analysis it would have been so described, or the earlier paragraph would not have been changed.

The construction which we have given the words "chemical analysis" is also reasonable when considered in connection with the practical administration of the law. As the learned trial judge pointed out, tests by sample of such a commodity as tea are usually erratic. The hardship to importers of being unable to determine beforehand whether or not their teas are going to be entitled to admission is great, at the best. Very delicate and sensitive tests to detect ultra-microscopic quantities of matter—quantities insufficient to produce any detrimental effect—are extremely ill-adapted to practical service, tend to work gross injustice, and are the ready instruments of fraudulent discrimination and preference. As a means of estimating the relative impurity of samples, chemical analysis of the ordinary sort is reasonably efficient. It is sufficiently sensitive to detect important impurities and to show their quantity. It is ordinarily not able to detect micro-

scopic quantities or to estimate their relative values. Accordingly a test of relative purity by the ordinarily understood method of chemical analysis produces a fair and reasonable result. Microscopic and harmless quantities of color or of any other impurity may escape, but the general purity of the two teas under examination can hardly fail to be fairly compared. On the other hand the Read test is substantially a microscopic process. Though it uses only a low power microscope, it previously separates and, by spreading or smearing them, to all intents and purposes greatly magnifies the particles sought for in the examination. The Read Test sheet shown by Dr. Acree (Exhibit C) made upon his teas colored with crystal violet (the particles of which he testified were so fine as to be invisible in a compound microscope) shows how large a smear on white paper such ultra-microscopic particles can make. The net result of the test is, therefore, the same as that of a microscopic examination. We cannot think that Congress intended, when it permitted the examination of teas by chemical analysis, to permit a purely microscopic examination, having no chemical characteristic, and using no chemical means or process; and on the other hand it is extremely probable that it did actually intend to reach just such a rough general result, in a comparison of the import with the standard, as would be reached by an ordinary chemical analysis looking for all foreign matter.

An additional means of ascertaining with what meaning Congress used the words may be found in examining the earlier Tea Law, the Act of March 2, 1883, Chap. 64 (22 Stat. 451), and the practice thereunder. That Act prescribed no method of examination, but the first Treasury

regulations issued under it provided that teas might be examined under the general regulations of 1874, in the manner prescribed thereby for examination of drugs, chemicals and medicines. This regulation called for a general chemical analysis of the ordinary type. It is submitted that in all probability the words "chemical analysis" were placed in the present Act with this practice in mind and were intended to call for a similar process.

The learned Assistant Attorney-General argues that though the statute prescribes an examination in accordance with the customs and usages of the tea trade, including if necessary chemical analysis, it does not forbid other modes of examination, and that therefore the board may use, for their information, any method they please. This argument is irrelevant. The statute does not merely say that the method in question shall be *used*, thus permitting, by failing to forbid other methods. It says that the comparative purity of standard and import "shall be *tested*" by that method. Obviously if the relative merits of two things are required to be tested by one method they cannot be tested by any other. If any other is used, and any weight given to the result, the comparison is not made in the required manner. If teas are passed or rejected on information derived from tests not in accordance with the customs of the tea trade, and not within the meaning of the term "chemical analysis", they are not tested in the sole authorized manner.

It is also argued that Congress cannot have meant to deprive the board of the benefit of modern improvements in methods of examination, or to confine it to the primitive cup test which when the

statute was enacted was, as it now is, the only method in accordance with the customs of the trade. There is, however, no inflexibility in the requirement. Though the trade customs have not in fact changed, they may and doubtless will as soon as science shall have developed a method practically superior to the "cup test". Any such new method, once become customary, will be within the act. But inflexible or not, the requirement is too reasonable to need construing out of its literal sense. To be fair to importers the test applied must be one which is in ordinary use, so that importers may ascertain, when teas are bought for import, whether they will be admissible or not.

It is further argued that the Read Test is a mere form of visual inspection, which is one of the methods of examination customary in the trade. It is an odd contention that the process may be at one and the same time a chemical analysis and a mere visual inspection; but if it were the latter the appellant would be no better off. The regulation prescribing the Read Test (Reg. 23) provides, "No consideration shall be given to the appearance or so called style of the dry leaf". The dry leaf is what the Read Test works upon. If it is a visual inspection of anything it is of the dry leaf. Since the appearance of the dry leaf is not to affect the result of the examination, visual inspection, however performed, cannot be deemed part of the prescribed method.

If the above reasoning is sound, the test prescribed by Regulation 22 is unauthorized by the Tea Law. If so, no one has a right to make the admission of the complainants' imports depend upon it, or to use it as the deciding test of comparative purity. The fact that its use will damage the com-

plainants by causing the rejection of their teas is apparent, not only from the testimony as to its action on such slight color as they contain, but because it has already rejected them at the port of entry. That they probably would not be rejected on a lawful examination appears from the testimony even of the respondents' witnesses that they contain less foreign matter than the standard. Every essential to show the right to an injunction against the use of this test was therefore proven.

POINT IV.

The Circuit Court of Appeals correctly held that the application for injunctive relief was not premature.

The appellants argue that an injunction should not issue in this case because the complainants have not exhausted the remedy given them by the statute—because, that is, they have not proceeded with their application for re-examination by the appellate board. This argument seems entirely to misapprehend the nature of our contentions. We are not seeking a review of an unfavorable action, nor are we testing the validity of an incomplete official act. We are seeking to enjoin the commission of threatened unlawful acts—the execution of official functions in an unauthorized manner. If, as we contend, the acts which the appellants intend to commit and are directed by the Department to commit are unlawful, we cannot be expected to bring about their commission before we go to court for relief. The illegality which we point

out entirely vitiates the alleged remedy given by the statute. In this matter of the exhaustion of remedies before asking equitable relief, as in other matters, the law does not require a vain thing (*Casc v. Beauregard*, 101 U. S. 688). When the contention is that the administrative decision is absolutely unauthorized (and it makes no difference in this connection whether it is unauthorized because unconstitutional or because unsupported by statute, *Philadelphia Co. v. Stimson*, 223 U. S. 605), a court of equity may be resorted to at once without waiting for appeals provided by statute (*Bacon v. Rutland R. R. Co.*, 232 U. S. 134). Especially must this be true where, as here, the illegality complained of taints the action of the tribunal to which it is contended that resort should be had. If we were here seeking to review the actual examination made by the examiner at the port, and to show that he erred, or that his decision was corrupt, it would of course be proper for the court to withhold relief until the complainants had ascertained whether they could not secure it from the appellate authorities; but in our case the very thing complained of is a proposed illegal action by the the appellate body itself, in the application of the very remedy which they say that we have left unexhausted. The principle contended for is entirely inapplicable.

The learned trial judge, however, said in his opinion:

"If it is ever right to coerce or guide the decision of any tribunal . . . it must have a chance to do right before it is assumed to be about to do wrong. This action asserts error before it is committed, and for this reason alone I should refuse the injunction."

To this statement the answer seems plain. In the first place we do not seek to coerce or guide the decision of the appellants, except in so far as an ordinary judicial construction of the statute, such as that which we ask, will guide it. We do not ask the court to say to the board, "Find the tea admissible", but only "Use the judgment and discretion, which the Tea Law has clothed you with in finding out by a lawful test whether the tea contains more or less foreign matter than the standard tea, and not merely in ascertaining by an unauthorized test whether or not the tea contains color".

The proposition that a tribunal must have a chance to do right before it is assumed to be about to do wrong may be sound enough, but in the present case there is no assumption about it. It is not a mere assumption that the appellants are about to do the things complained of. They assert it. Indeed their counsel expressly conceded on the trial that the respondents fully intended upon a re-examination to reject the teas in question, irrespective of any other considerations, if, on Read-testing, they found color therein (fols. 237-8, 284). The learned Assistant Attorney-General argues that there was no such concession. On page 24 of his brief he asserts that the language quoted and relied on by the Circuit Court of Appeals as the concession was that of the complainants' counsel. In fact, it was a restatement by him of what he understood to be conceded. When he finished the trial Court asserted (fol. 80) that counsel for the government said the statement was correct. There was no denial of this assertion. If such a concession is not to be treated as conclusive no agreement of counsel as to the facts can ever be

relied on. Where the intention to do the thing sought to be restrained is open and avowed, the principle suggested by the learned trial judge can have no application. It is a principle of comity intended to spare the sensibilities of a co-ordinate authority, which the court can enjoin, and will enjoin if need be, but will refrain from enjoining so long as the practical need of an injunction is not apparent. It is properly invoked in cases where there is doubt whether the proposed injury will in fact be committed, as the court naturally wishes to avoid, if it can, using its power to coerce another governmental body. Where, however, as here, the intention is expressly avowed and the intended conduct is merely a continuation of the established practice of the body in question, the principle cannot possibly apply. The action will certainly be taken and the injury inflicted if the injunction is not issued. There is no hope for a change of heart.

The rule governing just such situations was clearly expressed by the Supreme Court of the United States in *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65. In that case the complainants had a contract with the respondent City which gave them the exclusive right to maintain waterworks. The City, having obtained legislation authorizing it to build a competing waterworks, asserted, by resolution, that it denied the binding effect of the contract, and then proceeded to hold an election to authorize a bond issue for its new works. The Waterworks Company sued for an injunction, and was met with the contention here advanced—that its application was premature because the City had not yet impaired the obligation of the contract, and should not be assumed to be about to do so. Brushing aside this contention, and holding that the

injunction should have been granted, the Supreme Court said (at p. 82) :

"It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the Circuit Court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties, in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

The principle thus stated is doubly applicable to the present case because the conduct sought to be restrained is commanded by Treasury regulations which are explicitly directed to all examiners, thus including the appellants, and which, if valid, govern their actions.

To this contention the appellants and the learned trial judge answer, in substance, that Treasury regulations on the subject are not binding on the appellants, who, if they see fit, may reject teas merely for color, but are not obliged to do so. This answer, however, neglects the vital facts of the matter, which are that both the Treasury Department and the appellants evidently believe that the regulations are binding on the appellants; that the appellants intend to act in any event as if the regulations were

binding; and that the consequent injury to the complainants is thus unavoidable unless the injunction issue. Moreover, it is well settled that persons affected by such regulations have a right to assume that they will be acted on, and are not required to do anything so futile as to give the administrative officers an opportunity to disobey them. (*U. S. v. Lee*, 106 U. S. 196.)

The exact contention adopted by Judge Hough in this branch of his opinion was considered and condemned by the court in *Louisville & Nashville Co. v. R. R. Commission*, 157 Fed. 944. In that case, in support of the complainant's prayer for an injunction, it was shown that the conduct sought to be enjoined was commanded by certain orders of the governor. In their answering argument, the respondents insisted that they were not bound by the directions of the governor and that it should not therefore be assumed that they would commit the acts directed. The court specifically held that it made no difference whether or not the orders were binding but that under the pleadings, which very closely resembled those in the case at bar, the probability that the defendants would commit the alleged acts was sufficiently shown. The injunction accordingly issued. The passage of the opinion relating to this subject on pages 960-961 of the report is too long for quotation, but applies perfectly, and much of it reads as if written in the case at bar.

On the other hand, if relief is not sought now, it can hardly be sought at all. The decisions of the tea board are unappealable and cannot be reviewed by any court. If then, they make their decision on the theory which they say they intend to apply and by means of the Read method, the

damage will be irreparable. Their proceedings are secret. No one can show the grounds of this decision, or whether they in fact acted on the erroneous construction of the law. The only way in which such damage can be avoided is by action of the character herein sought. Under such circumstances the prayer for an injunction cannot be premature. To say that it is premature is to tell the complainants, not that they should have moved the court for relief at some later date, but that they should never move it at all. It is a total denial of relief.

Again, the application for an injunction against the use of the Read test is certainly not premature, even if the time for the other relief asked has not yet come. As to the method of examination which is to be used, the regulations of the Treasury Department are clearly binding (so far as they do not conflict with the statute) on all examiners, appellate as well as original. The details of carrying out the method of examination prescribed by the act are typical examples of the matters connected with the enforcement of the law which it was the purpose of the statute to commit to the authority of the Secretary of the Treasury. The test prescribed by him is either within the statute or it is not. If it is within the statute, the appellants must decide the ~~admissibility~~ of the test by it. If it is not, they have no right to do so. They have no discretion about it. There is no pretence that they do not believe the regulation requiring the use of the Read test to be lawful, or that they do not intend to obey it. Not even Judge Hough, we venture to state, would suggest that the appellants would have the right to disregard the Treasury Department's direction

to use the Read test, unless that test is unauthorized by the statute, in which case they would have no right to use it at all, whether directed or not. From all this it follows with practical certainty, that the appellants, if unrestrained, will use the Read test. If, therefore, it is—as we maintain—unlawful, the application to restrain them by injunction can hardly be premature, even if the application to restrain the appellants from rejecting teas for color only cannot yet be made. As to the test, there is no room for the contention that the appellants are free to act, and may not do as they threaten. They must do so, if they may.

POINT V.

The absence of any adequate remedy at law was demonstrated.

The Government's contention that no irreparable damage was shown and that the complainants had an adequate remedy at law is an afterthought, seriously presented for the first time in this Court. The question, though formally raised by the answer, was not actually litigated, either in the Trial Court or in the Circuit Court of Appeals.

In the first place, so far from there being any adequate remedy at law, there was no remedy at law whatever. This is a case in which equity offered the sole means of obtaining justice. It is perfectly well settled that the decision of the appellants upon the question of fact committed to them by the tea law is final. If, therefore, the complainants had waited until the teas were examined and

rejected, and had then brought an action at law to recover for the loss, they would instantly have been met with the contention that the inadmissibility of the teas was *res adjudicata* against them. If they should allege that the appellants had adopted and applied an incorrect construction of the law and rejected the teas on an unauthorized ground, they would be met by an insuperable difficulty in proof. The proceedings of the Board are not public; its conclusions are not reduced to judicial form, and any court considering one of those decisions would be obliged to assume that such decision was based at least in part upon conclusions of fact which the Board had a right to make.

Again, if an action at law should be brought against the appellants for damages resulting from an unauthorized rejection of the teas they would instantly contend that a quasi-judicial officer is not liable for an erroneous decision, though based on a false construction of a Federal statute (*Williams v. Weaver*, 100 U. S. 547). Having jurisdiction to decide the fate of the teas, their adoption of an unlawful ground of exclusion might well be deemed mere error, and thus no possible basis of legal liability. If not enjoined they can thus exclude the teas on a ground utterly unjustified by the law and then take refuge behind the rule granting immunity to public officers for mistakes.

All this, however, does not touch the real injury to the complainants. The latter are very large importers of tea. The question as to how the tea law is to be construed in the particulars here under consideration is obviously vital to their entire business. If every consignment of tea which they import is to be subjected to the hazard of rejection

for color or to that of the use of the Read test, the speculative element of the business is colossally increased and the inevitable losses, due to rejections, will be large and entirely incalculable. No proof was made of the details of these facts and none was necessary. The Court cannot help seeing that the practise of rejecting on an authorized ground would subject any large importer of tea to serious losses which could not possibly be estimated beforehand. Moreover the business credit and good name of the complainants are seriously injured by any and every unauthorized rejection. In proof of this it is perhaps sufficient to refer to the insinuations and innuendos of the Answer (for example at fol. 67) suggesting darkly that the complainants had made a practice of buying, on speculation, in the hope of somehow working them into the United States, teas which had been rejected by other buyers and were known to be colored. It hardly needs argument to show that persons who arrange for the importation of teas through dealers and customers whose deliveries are delayed by rejections are rendered by each rejection less likely to repeat their orders. It is true, as the appellants argue, that all tea merchants are in the same boat. This, however, does not affect the fact that every rejection does damage to the business and good will of the merchant whose importation is excluded. The fact that other merchants are subjected to similar disadvantages does not lessen the damage, and if the rejection is unauthorized it is a clear wrong and a proper basis for relief.

It must be remembered that the remedy at law which is to defeat equity jurisdiction must be *as* complete, *as* practical, and *as* efficient to the ends of justice and its prompt administration as the remedy

in equity (*Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1). Difficulty of proof seems to be an element to be considered in comparing the adequacy of the remedies (*Kilbourn v. Sunderland*, 130 U. S. 505). Clearly, here, the proof in an action at law would be vastly more difficult than in a suit in equity. We have for our equity suit the appellants' own concession as to their intentions: but for the action at law we should have to prove the operations of the appellants' minds—the fact that their decision was based on unauthorized, rather than authorized grounds.

Finally, as hereinbefore suggested, the concession of counsel for the Government at the trial was perhaps broad enough to cover the ground. Mr. Wemple, in admitting (fol. 112) that the damages referred to in Paragraph Sixteen of the complaint will exceed the sum of \$3,000, necessarily admitted the existence of some at least of the damages therein referred to. These were the particular injuries specified by paragraphs Thirteen, Fourteen and Fifteen of the complaint. They include the rejection of other teas, the loss of contracts and of custom by reason of illegal rejections and the injury to the business credit and good name of the complainants, all of which are alleged to be and obviously are difficult, if not impossible of computation. Though the concession only admits that these damages would exceed a given amount, it must be an admission that they existed; and if they existed at all they are obviously sufficiently difficult to compute to form a sound basis for equitable jurisdiction.

The case of *Cruickshank v. Bidwell*, 176 U. S. 73, relied on by the appellants as authority for the proposition that no equitable relief can be had in

such a case because there is an adequate remedy at law, is not in point. There the sole ground of complaint was the alleged unconstitutionality of the Tea Law. If that law had been unconstitutional the complainants would have a clear right of action at law, easy to enforce, against the collector for the value of teas destroyed under the act. No other damage than the loss of the teas in question was shown or could be inferred from the evidence. Moreover this court was evidently then inclined to hold that equitable relief could not be granted in advance against the action of administrative officers of the government in any, except perhaps the most extreme, case. The opinion cites (p. 80), as the only precedent, *Noble v. Union Co.*, 147 U. S. 165, where it says the Government raised no question as to the equity jurisdiction, which offered the only possible remedy. It then proceeds: "We are unwilling to extend that precedent." Since then, however, the court has exercised the jurisdiction freely, as in *American School of Magnetic Healing v. McAnnulty*, *supra*, and *Philadelphia Co. v. Stimson*, *supra*. In the most recent instance the jurisdiction was sustained against the Secretary of the Interior, the chief specific ground of equitable relief being that the complainant had much property, other than that in suit, as to which the same question would arise. *Santa Fe Co. v. Lane*, 244 U. S. 492. The same ground exists in the case at bar. The complainants are large importers of teas. Every consignment they import will raise the questions litigated here. No proof other than this single fact is necessary to show that the interposition of equity was required if only in order to prevent a multiplicity of suits.

POINT VI.

The decision appealed from should be affirmed.

The importance of the question offered for decision in this action is very great. Under the present conditions the complainants, employing the utmost care of which mankind is capable, Read-testing every sample before purchase, refusing absolutely to buy any teas which on Read-testing show any color, are utterly unable to determine whether or not the teas purchased by them can be brought in. Time and again teas of the highest quality, inestimably superior to the standard, are rejected while infinitely inferior teas known to contain color, imported by their competitors, pass the test and are allowed to enter. There is no relief and no redress. It is practically impossible for a buyer to examine more than a few samples of any line purchased. The preparation of a Read test sheet takes but a short time, but its examination under the magnifying glass required by the regulations obviously requires very long and careful scrutiny—sometimes hours. When the tea is very free from color, every one of the innumerable markings on the paper must be examined before the examiner can be sure that none of the microscopic specks are blue. If a single test would accurately show the characteristics of the samples examined, so that, allowing for that lack of uniformity which will always be apparent in samples, some inference might safely be drawn as to the nature of the whole consignment, the test would be barely practicable; but with the gross uncertainty of its action, protection could not be

secured if the importer were to put through the Read test sieve a tenth part of the entire tea purchased by him. The regulations themselves recognize the uncertainty. Regulation 22 provides for the repetition of the test after it is first made. If on a repetition results inferior to standards appear, no less than 5 per cent. of the line is to be sampled and Read-tested and results of those tests are to be compared. This shows very clearly that the results of the tests upon the same tea vary widely. This again is shown by the frequency of the reversals by the general appraisers who, applying the same tests as the examiners at the ports, have in very many cases reversed their rulings. The net result of the entire method as now practiced is to reduce the tea business to a mere speculation.

And there is no reason for the adoption of any such method. There is hardly a pretense that the color for which tea is excluded is objectionable in any sense. It is certainly harmless and it now occurs in quantities too small to affect even the appearance of the tea. Such quantities of course as were dealt with in the testimony in this case could not possibly be condemned under the Pure Food Law (*U. S. v. Lerington Mill Co.*, 232 U. S. 399). That statute would seem to indicate the true public policy of the country in regard to such matters and to show that other statutes which may tend incidentally to give the public the same sort of protection should not be widened by construction so as to make them go further than the Pure Food Law itself goes. These complainants hold no brief for colored tea or for any impure product. They have done their best to conform to the law and to the regulations as now framed, but they have suffered

enormous losses from the uncertainty of the existing test. This has placed their business upon a speculative basis which they have always hitherto avoided. They are contending only against what they believe to be an unlawful assumption of power by the executive authorities and the creation of a system of examination which not only tends to shut out the best and purest teas and let in teas less fit for consumption, but also offers the most direct opportunities for oppressive and corrupt discriminations, of which they believe that they and certain other importers have been the victims. They do not desire to import and do not willingly import a single pound of impure or otherwise objectionable tea, but they believe that Congress never intended to permit the Department to disregard important impurities, or to determine vast property rights in accordance with the result of a haphazard test used to determine the presence or absence of microscopic quantities of harmless matter.

Respectfully submitted,

EVARTS, CHOATE & SHERMAN,
Solicitors for Complainants-Appellees.

JOSEPH H. CHOATE, JR.,
Of Counsel.

WAITE ET AL., AS GENERAL APPRAISERS, DESIGNATED BY THE SECRETARY OF THE TREASURY AS THE BOARD OF TEA APPEALS, *v.* MACY ET AL., DOING BUSINESS AS COPARTNERS UNDER THE NAME OF CARTER, MACY & COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 255. Argued March 28, 1918.—Decided April 22, 1918.

A transgression of its statutory power by an administrative board is subject to judicial restraint, although guised as a discretionary decision within its jurisdiction.

In testing the right of injunction against administrative officers, the presumption that they will follow the law, though set up in their answer, cannot be indulged where an intention to obey an illegal regulation of their superior is not directly disclaimed by them and is admitted by their counsel.

The only grounds recognized by the Act of March 2, 1897, c. 358, 29 Stat. 604, as amended, c. 170, 35 Stat. 163, for excluding tea from import, are inferiority to the standard in purity, quality and fitness for consumption; and, where the tea offered is otherwise superior to the standard in value and purity, the fact that it contains a minute and innocuous quantity of coloring matter not found in the sample will not justify shutting it out, notwithstanding a regulation of the Secretary of the Treasury, purporting to be based on the statute, declares the presence of any coloring matter an absolute ground for exclusion.

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In the absence of other adequate remedy for the importer, the Tea Board constituted under the Act of 1897, *supra*, may be enjoined from excluding tea upon a test prescribed by the Secretary of the Treasury but not sanctioned by the statute.

224 Fed. Rep. 359, affirmed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Warren for appellants.

Mr. Joseph H. Choate, Jr., for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by importers of tea to prevent the appellants, a board of general appraisers known as the Tea Board, from applying to tea imported by the plaintiffs tests which, it is alleged, are illegal and if applied will lead to the exclusion of the tea. The bill was dismissed by the District Court, 215 Fed. Rep. 456, but the decree was reversed and an injunction ordered by the Circuit Court of Appeals, 224 Fed. Rep. 359. 140 C. C. A. 45.

The case is within a narrow compass. The Act of March 2, 1897, c. 358, 29 Stat. 604, amended by the Act of May 16, 1908, c. 170, 35 Stat. 163, provides for the establishment of standards "of purity, quality, and fitness for consumption, of all kinds of tea imported," &c., § 3, and makes it "unlawful . . . to import any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards" referred to. § 1. When the tea is entered at the custom house it is compared with the standards by an examiner and if found equal to them in the above particulars it may be released by the custom house; if found inferior it is to be retained. § 5. But either side may protest and have the matter referred to a board of three general appraisers such as the appellants are. If upon a final reëxamination by the board "the

tea shall be found inferior in purity, quality, and fitness for consumption to the said standards" the tea must be removed from the country within six months. § 6. The tea is to be tested in the particulars mentioned "according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis." § 7. The Secretary of the Treasury is given power to enforce the provisions of the act by appropriate regulations. § 10. A regulation has adopted a test for the discovery of artificial coloring matter which in brief consists in rubbing tea leaves reduced to dust upon semi-glazed paper with a spatula and examining the smear with a lens. If particles of coloring matter are found a test sheet is submitted to chemical analysis for identification of the coloring matter and as soon as it is identified the tea is to be rejected. It was said below to be undisputed that if the tea in question contains any coloring matter, whether present through design or accident, the appellants pursuing the regulation will keep it out. The standard samples of this tea contain no coloring matter but contain a far greater amount of other foreign substances than does this. This tea is worth nearly four times as much a pound as the standard and the sole cause for rejecting it is the presence of from nine to nineteen parts of Prussian blue in a million of elements otherwise not objected to. It is not contended that the Prussian blue is deleterious. These facts are found by both Courts below. Upon them the plaintiffs (the appellees) say that the Government is attempting to apply criteria not allowed by the law. The Government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of the board.

No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot en-

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large the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. *Morrill v. Jones*, 106 U. S. 466. *United States v. United Verde Copper Co.*, 196 U. S. 207, 215. *United States v. George*, 228 U. S. 14, 21. Again, it is true that Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. *First National Bank of Albuquerque v. Albright*, 208 U. S. 548. But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make. It is said that the appellants are independent of the Secretary and that it is to be presumed that they will decide according to law, as they say in their answer. But if the avoidance of a direct statement as to their intent did not of itself warrant a presumption that they would obey orders, the admissions of their counsel were enough to make their intent to do so plain.

We are brought then to the merits, and we are of opinion that the rule cannot be sustained, notwithstanding that since a former board refused to follow it as it then stood, there has been added clauses intended to save it as a chemical analysis. The regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality and fitness for consumption, words repeated over and over again in the act. It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much. All extraneous substances are impurities, and the presence of any may be detected in any way found efficient. But one such substance cannot be picked out and accorded supremacy in evil by an absolute

rule irrespective of any harm that it may do. We go one step further and add that in view of the facts as to the standard and this tea, the presence of the Prussian blue affords no adequate ground for keeping the tea out.

The Secretary and the board must keep within the statute, *Merritt v. Welsh*, 104 U. S. 694, which goes to their jurisdiction, see *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 544, and we see no reason why the restriction should not be enforced by injunction, as it was, for instance, in *Bacon v. Rutland R. R. Co.*, 232 U. S. 134. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620. *Sante Fe Pacific R. R. Co. v. Lane*, 244 U. S. 492. We are satisfied that no other remedy, if there is any other, will secure the plaintiffs' rights.

Decree affirmed.
